Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

SYLVIA SCOTT, *et al.*,
Petitioners,

v.

PASADENA UNIFIED SCHOOL DISTRICT *et al.*,
Respondents.

On Petition for Rehearing En Banc to the Ninth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

GARY G. KREEP *
RICHARD D. ACKERMAN
KEVIN T. SNIDER
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Elements of the First Prong of Article III Standing (Injury In Fact) in an Equal Protection Context be Modified from the Rule Provided by this Court in *North-Eastern Florida Chapter of Associated General Contractors of American v. City of Jacksonville*, 508 U.S. 656 (1993)?

2. Does the Ripeness Doctrine require a party to wait and see the manner in which the Government will carry out a Race and Gender based policy before bringing a facial challenge to said policy?

LIST OF ALL PARTIES

The complete list of the Petitioners is as follows: SYLVIA SCOTT, as guardian ad litem for minors, DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES, and RONALD RUCKER; RENÉ AMY, as guardian ad litem for minors, CAMDEM RENÉ AMY and MARISSA LARAINE AMY; GEORGE FRANCIS MACPHERSON and SILVIA JIMENEZ MACPHERSON, as guardian ad litem for minor, GEORGE GORDON MACPHERSON; ROMEO ALVA, as guardian ad litem for minor, JOCELYNE ALVA (collectively referred to as "Scott" or "Petitioners.")

The complete list of the Respondents is as follows: PASADENA UNIFIED SCHOOL DISTRICT; GEORGE VAN ALSTINE; GEORGE PADILLA; JACQUELINE JACOBS; BONNIE ARMSTRONG; LISA FOWLER; VERA VIGNES; in their individual and official capacities, and JOSEPH WHITE ASSOCIATES * (collectively referred to as "PUSD" or "Respondents).

To Petitioners' knowledge, there are no parent companies or non-wholly owned subsidiaries of the parties.

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* Joseph White Associates was voluntarily dismissed by Scott in the District Court.

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PETITION FOR A WRIT OF CERTIORARI

CITATIONS TO OPINIONS AND ORDERS ENTERED IN THE CASE

The denial of *en banc* review by the United States Court of Appeals for the Ninth Circuit appears in Appendix A to this Petition. The published Opinion of the United States Court of Appeals for the Ninth Circuit appears in Appendix B to this Petition. The order, findings of fact, judgment, and sua sponte orders of the District Court denying PUSD's motion for summary judgment and granting Scott's motion for summary judgment appear in Appendices C through F, respectively, to this Petition.

STATEMENT OF JURISDICTIONAL BASIS

Title 28, U.S.C. § 1254(1), provides in part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of

certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THE CASE.

Article III, Section 2 of the U.S. Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Fourteenth Amendment states, in pertinent part:

> Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 31 of the California Constitution states, in pertinent part,

> (a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

STATEMENT OF THE CASE

PUSD is a public school district which operates three voluntary schools. Pursuant to its integration policy, to gain admittance to said schools, a pupil must submit an application which is then used in a lottery to assign students to open seats as per the Board Policy ("BP") 0460(c)(7). The integration policy states, in pertinent part, as follows: "When necessary to create an integrated setting, consideration will be given during the student assignment process to several factors, including gender, race or ethnicity. . . ." BP 0460(d)(8). According to the integration policy, it becomes "necessary to create an integrated setting" at sites where "the number of students in any major ethnic group varies from the percentage of such students in the overall district student population by +/_20%." BP 0460(c)(3). At these locations, "no additional permits or transfers from this group may be granted into these sites." BP 0460(c)(3).

The lottery application requires racial and gender self-identification. As to how racial parameters operate relative to the lottery, the policy states, "[i]n assigning students to a voluntary or magnet school, the lottery process *shall* utilize the parameters set forth in this policy to promote an integrated setting." BP 0460(c)((7) (emphasis added).

It is Scott's position that the integration policy is inconsistent with the equal protection clause of the Fourteenth Amendment, as well as Article I, Section 31 of the California Constitution, as she cannot apply to 100% of the seats as a result of the uncontrolled circumstance of race. *Regents of University of California v. Bakke*, 438 U.S. 265, 281, footnote 14 (1978).

Scott applied to the voluntary schools prior to the use of the lottery. The Scott children are black, Hispanic, white and multiracial. After the suit was filed, the lottery was held and one of the plaintiff children (MacPherson) was not selected.

In declarations filed in support of summary judgment, each of the Scott plaintiff-parents asserted that they intend to submit applications to voluntary schools for their children for the coming years into the foreseeable future.

The District Court ruled for Scott in a motion for summary judgment finding that "[t]he racial and ethnic classifications embodied in BP 0460 do not serve a compelling government purpose nor are they narrowly tailored." The Ninth Circuit did not reach the merits of the case. Instead, it reversed the District Court asserting that Scott lacked standing and that the case was not ripe.

ARGUMENTS AMPLIFYING AND SUPPORTING WRIT

The only issue as to standing in the present Petition is that of "injury in fact." As such, the key issues as to standing are whether there has been (1) a factual representation that the complaining party is ready and able to apply for an open seat into the foreseeable future; and, (2) whether the school's integration policy authorizes the use of the racial and gender set-asides.

The issue as to ripeness is whether a policy which provides or withholds benefits based upon race and gender can be facially challenged. Or, as a prerequisite, must a party wait an indefinite amount of time to see how the policy is carried out by the government prior to bringing such a facial challenge? Essential to that issue is whether the government can execute an unconstitutional law in a constitutional manner.

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH SUPREME COURT OPINIONS RELATIVE TO STANDING IN THE EQUAL-PROTECTION CONTEXT.

There is no debate that Article III standing is required for a federal court to have jurisdiction. Further, there can be no serious dispute that the elements for standing are threefold as follows: (1) injury in fact; (2) the injury must be traceable to the challenged action of the defendant; and, (3) the injury is remediable by appropriate court action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is the "injury in fact" prong of the *Lujan* test which is at issue between the parties and on which Scott asserts that the Ninth Circuit made profound errors of law.

Petitioners disagree with the Ninth Circuit as to how the three-pronged *Lujan* test is applied in the context of an equal protection case. The Ninth Circuit asserts that the application of the *Lujan* test is analyzed in the same manner for claims involving the First Amendment and even criminal cases as it is in the equal protection context. As such, the Ninth Circuit erroneously erected additional barriers to standing than those articulated by this Court in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). Specifically the Ninth Circuit asserted that the "injury-in-fact" element of standing requires an "imminent threat of enforcement." The Ninth Circuit's basis for this position is *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000).

In support of the Ninth Circuit's erroneous assertion that the "injury-in-fact" element of standing requires an "imminent threat of enforcement," the court applied the three-pronged test found in *Thomas* as follows:

> First, the plaintiff must articulate a "'concrete plan' to violate the law in question." [*Thomas*] 220 F.3d at 1139 . . . Second, a plaintiff may satisfy the injury-in-fact

> requirement by demonstrating that government officials "have communicated a specific warning or threat" of enforcement . . . Third, the Thomas panel held that a claim for prospective relief can be based on a history of discriminatory enforcement of the challenged governmental policy, but the absence of such a history will support a conclusion that a potential injury is not imminent. 220 F.3d at 1140. *Scott*, at 13098.

As an initial matter, it should be noted that *Thomas* was a case dealing with First Amendment religious and speech rights rather than equal protection. The analysis is different for purposes of standing when a case is brought under these two distinctive rights. In essence, a cause of action for violation of the rights to free speech and exercise of religion involves a claim that the government has passed a law or has a policy which prevents the claimant from communicating ideas or engaging in religious practices. A complaint based upon equal protection asserts that the government has erected a barrier making it more difficult for a claimant to seek a benefit than it is for others.

Scott asserts that the three-pronged *Thomas* test differs significantly from the analysis in *Northeastern Florida*. Thus, reliance on *Thomas* is misplaced.[1]

It is necessary to compare and contrast *Thomas* with *Northeastern Florida*. The first prong of *Thomas* is that there is a concrete plan to violate the law. *Thomas*, *Id.*, 1139. The Scott panel found that,

> Scott presented affidavits before the district court representing the intentions of individual plaintiffs to apply to PUSD voluntary schools during the earliest

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[1] Interestingly the Court of Appeal actually cites *Northeastern Florida* but then analyzes the facts in Scott relying exclusively on nonequal protection case-law, which applies different standards for standing. In other words, the court did not look to see if the facts in Scott fit the stated rule for standing found in *Northeastern Florida*.

> available application cycle. However, a pledge of general intent to place oneself within the purview of a challenged policy that fails to "specify . . . under what circumstances" that policy might be enforced will "not rise to the level of an articulated, concrete plan." (Quoting *Thomas*, *Id.*, 1139.) *Scott*, at 13107.

In contrast, the rule in *Northeastern Florida* is that a party need merely show that he is ready and able to make application for the benefit. *Northeastern Florida*, *Id.*, 666. In the present case, not only is Scott ready and able to apply, but Scott has stated "I intend to submit applications to the appropriate voluntary schools for my foster children for the coming years into the foreseeable future." Declaration of Sylvia Scott, ¶ 7, Excerpt of Record ("E.R.") 408.[2] Indeed, in the present case, there are three voluntary schools (Don Benito K-5, Norma Coombs Alternative School K-8, and Marshall Fundamental 6-12). The Ninth Circuit found that plaintiff children George MacPherson and Detrick Standmore "remain eligible to apply to PUSD's voluntary schools in the future." *Scott*, at 13102. As these children remain eligible to apply to the voluntary schools for years to come, and their parents have submitted declarations stating that they will submit applications for these children for open seats at the voluntary schools into the foreseeable future, the "injury-in-fact" requirement of standing is established as a matter of law under *Northeastern Florida*. *Id.*, 666.

Further, unlike the standing analysis for First Amendment purposes described in *Thomas*, the "injury in fact" occurred at the time that Scott submitted her application prior to the filing of the First Amended Complaint and the lottery. Of course, the issue of standing is determined by the facts at the time the

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[2] Each of the parents of the plaintiff children submitted declarations which make the same affirmation, (see, Declaration of Amy, ¶ 15, E.R. 407; Declaration of MacPherson, ¶ 12, E.R. 405; Declaration of Alva, ¶ 5, E.R. 415.)

complaint is filed. *Newman-Green, Inc. v. Alfonzo-Larrian*, 490 U.S. 826, 830 (1989).[3] Moreover, in complete contrast to the rule in *Thomas*, the "injury in fact" occurs every time that Scott submits an application. Being forced to compete on an unequal basis because of race (or sex) is an injury under the equal protection clause. *Northeastern Florida, Id.*, 666.

As this Court has made it clear, the "injury-in-fact" prong of standing in equal-protection analysis is not the "imminent threat of enforcement," as the Ninth Circuit has erroneously asserted. *Scott*, at 13103. It occurs when an application for a benefit is submitted. In Scott, this first occurred prior to the filing of the First Amended Complaint and will occur into the foreseeable future every time that Scott submits an application in which she cannot apply to 100% of the open seats due to the uncontrolled circumstance of race or gender. *Bakke*, Id., 281.

The second prong of *Thomas* is that a plaintiff may satisfy the "injury-in-fact" requirement by demonstrating that government officials have communicated a specific warning or threat of enforcement. The panel stated, "PUSD has given no indication that it intends to apply a weighted factor in any future lottery." *Scott*, at 13108. The Ninth Circuit has made a new, burdensome and legally-flawed test for standing purposes in an equal protection context.

It should be noted that the ordinance at issue in *Northeastern Florida* did not *require* the use of set-asides, it merely *authorized* them. In like manner, the policy at issue here does nothing less. As *Northeastern Florida* shows, the relevant question is not whether a statute "requires" the use of such measures, but whether it "authorizes" or "encourages" them. In the present case, even if one were to liberally

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[3] It is worth noting that, despite this fundamental rule which distinguishes mootness from standing, the Ninth Circuit frequently discussed post filing facts in its opinion.

construe the facts in favor of PUSD, as the Ninth Circuit did, the issue is not whether in practice PUSD *required* the use of race or gender, but, rather, whether the policy in question *authorized* said use. It is not subject to reasonable dispute that the policy, on its face, authorizes the use of race and gender. The policy states, in pertinent part, as follows:

> At sites where the number of students in any major ethnic group varies from the percentage of such students in the overall district student population by +/_20%, no additional permits or transfers from this group may be granted into these sites. BP 0460(c)(3).[4]

Further, as the Ninth Circuit observed, "PUSD Superintendent Vignes has stated that race or ethnicity would be applied as an admissions factor only under 'compelling' circumstances 'where [a] school was so racially identifiable that it was a segregated school or was fast moving in the direction of becoming a segregated school.' Decl. of Vera Vignes (Jan. 24, 2000) ¶ 11." *Scott*, at 13109. In view of the plain meaning of the integration policy, as well as, the statement by the Superintendent, the use of race is unquestionably "authorized." The *Thomas* analysis, again, is inconsistent with *Northeastern Florida*.

The third prong of *Thomas* is that a claim for prospective relief can be based on a history of discriminatory enforcement

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[4] The Ninth Circuit panel complained that certain sections of the PUSD integration policy (BP 0460) were not properly raised as issues in the opening brief or in the District Court. This is simply a blatant misreading of the record. BP 0460 was attached as an exhibit to the complaint; it appears twice in the record; it was thoroughly briefed by both parties in their primary briefs as well as the numerous *amici*; in the conclusion of the District Court's order, it BP 0460 was broadly described as follows: "The racial and ethnic classifications embodied in BP 0460 do not serve a compelling government purpose nor are they narrowly tailored."; and, numerous sections of BP 0460 were quoted verbatim in the findings of law and conclusions of fact. It is baffling that the panel could conceivably assert that any portion of BP 0460 was not properly before it.

of the challenged governmental policy, but the absence of such a history will support a conclusion that a potential injury is not imminent. *Thomas, Id.*, 1140. No such requirement is found in *Northeastern Florida*. As per *Northeastern Florida*, an injury results not only when the applicant actually is not provided a seat because of gender or race, but every time the student simply submits an application.

In *Bakke*, an applicant for medical school was denied admission because he was white. This Court held that said denial constituted the requisite injury because Bakke was not "permitted . . . to compete for all 100 places in the class simply because of his race." *Bakke*, Id., 281 footnote14. In addition, this Court stated that "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing." Id.280-81 footnote14. Just as Bakke and the contractors in *Northeastern Florida* suffered injury in fact because they were denied equal protection, so too, Scott has suffered injury in fact. The Ninth Circuit attempted to distinguish the "injury-in-fact" rules by asserting that "the mere existence of the admissions policy, standing alone, is insufficient to satisfy the requirement of Article III standing and that, therefore, we lack jurisdiction over Scott's state and federal claims." *Scott*, at 13097. In support of this, the court relied on nonequal-protection cases which were decided a decade before *Northeastern Florida*.[5]

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[5] "The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III. *Stoinaff v. Montana*, 695 F.2d 1214, 1223 (9th Cir. 1983); *Western Mining Council v. Watt*, 643 F.2d 618, 627 (9th Cir. 1981); see also *Thomas*, 220 F.3d at 1139 (stating that "neither the mere existence of a prospective statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement.") . . . *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)." *Scott*, 13101. Not only were these cases decided prior to *Northeastern Florida*, they generally did not involve equal protection

As explained above, this denies the salient facts in this case that Scott submitted applications for seats at the voluntary schools and intends on submitting applications for the coming years into the foreseeable future. As a matter of law, this brings Scott fully within the sphere of standing in an equal-protection case as per *Northeastern Florida*. Until now, no other circuit has added additional elements to the stated rule for standing found in *Northeastern Florida* in an equal-protection context. The Fourth, Seventh and Tenth Circuits have all applied the *Northeastern Florida* rule in a straight-forward manner. See, *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 09/03/1996); *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 01/09/1995); *Clajon Production Corp. v. Petera*, 70 F.3D 1566 (10th Cir. 11/20/1995). The Ninth Circuit has now brought uncertainty by erecting additional barriers to standing as it relates to equal-protection causes of action. The granting of this Petition is necessary to bring back uniformity on this important constitutional issue.

II. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH SUPREME COURT OPINIONS ADDRESSING RIPENESS IN THE CONTEXT OF A FACIAL CHALLENGE TO A RACE AND GENDER-BASED LAW.

The Ninth Circuit also ruled that the case is not ripe. Once PUSD has enacted a race and gender-based policy, said policy must articulate a narrowly-tailored compelling state interest. At issue is, if the school district's integration policy does not have a narrowly-tailored compelling state interest, as stated on its face, must Scott wait an indefinite amount of time to see if PUSD will carry out the unconstitutional policy in a constitutional manner? More to the point, can the government carry out an unconstitutional law, which it has

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issues. The exception is *Lyons* which mentioned, as *dicta* in a footnote, that a cause of action was brought under the equal protection clause.

enacted, in a constitutional manner? Scott asserts that, for purposes of equal protection analysis, to do such is an impossibility. Thus, a facial challenge to the law is not legally premature.

In contrast, the Ninth Circuit asserts that a facial challenge to a racial policy is improper. "'[A] rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test.'" *Scott*, at 13113 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989), Justice Kennedy concurring). First, this implies that it is Scott's position that every policy based upon race is automatically invalid. The briefs submitted by Scott state otherwise. In sum, it is Scott's position that a race based policy must be based upon a narrowly-tailored compelling state interest. *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 227 (1995). Thus, if a written law facially fails the narrowly-tailored compelling state interest test, a "case-by-case" wait-and-see stance would be a frivolous undertaking.

Second, the Ninth Circuit's reliance on *Croson* is misplaced. It is incorrect that either the majority opinion in *Croson*, or Justice Kennedy's concurring opinion, proffered that relief should be denied in a facial challenge to a race based law for lack of ripeness. No where in *Croson* is that stated or implied.

Third, the "case by case test" refers to whether the law in question is narrowly drawn to achieve a compelling state interest. *Croson, Id.*, 498. It is not a wait and see posture. As the litigants in *Croson* did, a party can bring a facial challenge to a race-based law. *Croson, Id.*, 483. It is Scott's position that when a governmental body is defending a racially-based policy, the burden of justification falls on the government. A "generalized assertion" of past discrimination and present effects does not meet that burden. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989).

Moreover, the mere recitation of a remedial purpose "is entitled to little or no weight." *Id.* at 500. Simply put, racial classifications are suspect and assurances of good intentions "cannot suffice." *Id.* at 500. The Ninth Circuit's ruling in *Scott* has it backwards. It would place the burden on the plaintiff to show that the race-based policy has been shown over time to be constitutionally infirm. This is a dangerous liberty that the Ninth Circuit is giving to the government in the volatile area of race.

Thus, the Ninth Circuit's refusal to accept a facial challenge to the policy and requiring Scott to wait and see if PUSD will act in a manner which demonstrates a narrowly-tailored compelling state interest, is an attempt to insert a new rule for ripeness which is inconsistent with *Croson* and *Northeastern Florida.*

Further, in finding that the case was not ripe, the Ninth Circuit stated: "As a prudential matter, we will not consider a claim to be ripe for judicial resolution if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scott*, at 13111 (inner quotation marks omitted). Relying on the language in *Warth v. Seldin*, 422 U.S. 490, (1975), the City of Jacksonville proffered identical reasoning in *Northeastern Florida.*

> The complaint refers to no specific project of any of [the association's] members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit . . . with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by [the association's] members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, [the association] has failed to show the existence of any

> injury to its members of sufficient immediacy and ripeness to warrant judicial intervention. *Northeastern Florida*, *Id.*, 667, quoting *Warth*, at 516.

This Court distinguished the reasoning by the City of Jacksonville as to ripeness and reversed the appellate court stating,

> the construction association in *Warth* did not allege that "any member had applied . . . for a building permit or a variance with respect to any current project." [*Warth*] *Id.*, at 516. Thus, unlike the association in *Warth*, petitioner has alleged an "injury . . . of sufficient immediacy . . . to warrant judicial intervention."

Like the petitioner in *Northeastern Florida*, Scott clearly did apply for open seats and has unequivocally stated that she intends to submit applications for all open seats in the future. Thus, the Ninth Circuit's reasoning on ripeness is again inconsistent with the decision in *Northeastern Florida*.

Finally, the Ninth Circuit's new wait-and-see rule will work as a prohibition against bringing a challenge to a written law which is unconstitutional on its face. In the present case the integration policy expresses no compelling state interest. Even if there was an unstated compelling state interest present, the policy is not narrowly-tailored. For example, it does not address any of the five prongs of the test for narrow tailoring articulated in *United States v. Paradise*, 480 U.S. 149, 171 (1987). Rhetorically, one must ask, why should a party be forced to wait and see how the government will carry out a race-based law which, on its face, is not narrowly-tailored?

In like manner, the integration policy also runs afoul of the much stricter provisions of California's Constitution. Section 31 of Article I of the California Constitution prohibits the government from discriminating against, or giving benefits to, any person on the basis of race or gender. "The State shall not discriminate against, or grant preferential treatment to,

any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CA Const., Art I, § 31.

The integration policy facially discriminates against those children who are part of a racial or ethnic group who make up a larger part of the applicant pool to the voluntary schools than they do the district as a whole, i.e., they are part of an applicant pool which trespasses the mandatory +/-20% racial boundaries. Conversely, those students who fall within the +/-20% racial parameter test are given a benefit by the government solely because of their race. It may not be known in any given year which race or ethnic group will be affected. But, the inescapable reality is that the policy inherently provides benefits, and also discriminates, based upon race in violation of the California Constitution.

In view of the blatant facial problems inherent in this integration policy, the question must be asked, can a facially unconstitutional law be executed in a constitutional manner? Surely not. However, the Ninth Circuit's new prohibition on facial challenges makes the presumption that unconstitutional laws can be carried out constitutionally. Scott asserts that the Ninth Circuit has created a dangerous presupposition. As such, it asks this Court to grant review.

CONCLUSION

The Ninth Circuit's published opinion in *Scott*, if allowed to stand, will create confusion because it adds elements for standing in an equal protection context which are inconsistent with *Northeastern Florida*. Moreover, by doing so, it has created a conflict among the circuits in this area of standing. Finally, by asserting that this case lacks ripeness, the Ninth Circuit has now prevented a party from bringing a facial challenge to written law. In essence, the Ninth Circuit has now created a bright line rule that a party must take a "wait-

and-see approach" to a facially-invalid policy. This is not only inconsistent with this Court's ruling in *Northeastern Florida*, it presumes that the government can execute an unconstitutional law in a constitutional manner.

For the foregoing reasons, Scott respectfully requests that this Petition be granted. In the alternative, Scott requests that the case be remanded back to the Ninth Circuit for review which is consistent with the opinion in *Northeastern Florida*.

Respectfully submitted,

GARY G. KREEP *
RICHARD D. ACKERMAN
KEVIN T. SNIDER
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record *Counsel for Petitioners*

January 8, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Oct. 10, 2002]

No. 00-55532
00-55666
00-55789

D.C. No. CV-99-01328-DT

SYLVIA SCOTT, as guardian *Ad Litem* for minors, DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES & RONALD RUCKER; RENE AMY, as guardian *Ad Litem* for minors CAMDEM RENE AMY & MARISS LARAINE AMY; GEORGE FRANCIS MACPHERSON, as guardian *Ad Litem* for minor, GEORGE GORDON MACPHERSON; SILVIA JIMENEZ MACPHERSON, as guardian *Ad Litem* for minor GEORGE GORDON MACPHERSON; ROMEO ALVA, as Guardian *Ad Litem* for minor, JOCELYNE ALVA,

Plaintiffs-Appellees-Cross Appellants,

v.

PASADENA UNIFIED SCHOOL DISTRICT; GEORGE VAN ALSTINE; GEORGE PADILLA; JACQUELINE JACOBS; BONNIE ARMSTRONG; LISA FOWLER; VERA VIGNES, in their individual and official capacities,

Defendants-Appellants-Cross Appellees.

ORDER

Before: B. Fletcher, D.W. Nelson and McKeown, *Circuit Judges.*

Judge McKeown has voted to deny the petition for rehearing en banc, and Judges B. Fletcher and D. Nelson have recommended the same.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

[Filed Sept. 4, 2002]

Nos. 00-55532, 00-55666 and 00-55789.

SYLVIA SCOTT, as guardian Ad Litem for minors, DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES & RONALD RUCKER; RENE AMY, as guardian Ad Litem for minors CAMDEM RENE AMY & MARISS LARAINE AMY; GEORGE FRANCIS MACPHERSON, as Guardian Ad Litem for minor, GEORGE GORDON MACPHERSON; SILVIA JIMENEZ MACPHERSON, as guardian Ad Litem for minor GEORGE GORDON MACPHERSON; ROMEO ALVA, as guardian Ad Litem for minor, JOCELYNE ALVA,

Plaintiffs-Appellees-Cross-Appellants,

v.

PASADENA UNIFIED SCHOOL DISTRICT; GEORGE VAN ALSTINE; GEORGE PADILLA; JACQUELINE JACOBS; BONNIE ARMSTRONG; LISA FOWLER; VERA VIGNES, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,

Defendants-Appellants-Cross-Appellees.

Argued and Submitted Oct. 17, 2001

Appeal from the United States District Court Central District of California; Dickran Tevrizian, *District Judge*, Presiding. D.C. No. CV-99-01328-DT.

Before: B. FLETCHER, D.W. NELSON, and McKEOWN, *Circuit Judges*.

BETTY B. FLETCHER, *Circuit Judge*.

This action arises out of a state and federal constitutional challenge brought by parents Sylvia Scott, René Amy, George Gordon MacPherson, Silvia Jimenez MacPherson, and Romeo Alva (collectively "Scott"),[1] serving as guardians *ad litem* on behalf of eight minor student plaintiffs[2] enrolled in the Pasadena Unified School District ("PUSD," or the "District"), against the District's 1999-2000 admissions policy governing three voluntary schools. The challenged policy permits race and gender, in addition to other factors, to be taken into account under special circumstances during an admissions lottery. Defendants to the action comprise PUSD, individual members of the PUSD's Board of Education (the "Board"),[3] and PUSD Superintendent, Vera Vignes.

Plaintiff-appellees allege that PUSD's use of race as an admissions factor violated both the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, § 31 of the California Constitution. In addition, plaintiffs allege that they are entitled to damages under California Civil Code § 52 (the "Unruh Act"). PUSD now appeals the district court's order granting summary judgment in favor of plaintiffs' federal and state constitutional claims and denying PUSD's cross-motion for

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[1] When necessary to address factual distinctions, we will refer to the student plaintiffs individually. See infra note 2. Otherwise, we refer to the plaintiff's collectively as "Scott."

[2] Named plaintiffs represent respectively: by Sylvia Scott, minors Detrick Standmore, Kayla Hunter, Michaela Reyes, and Ronald Rucker; by René Amy, minors Camden René Amy and Marissa Laraine; by George Gordon MacPherson and Silvia Jimenez MacPherson, minor George Gordon MacPherson; by Romeo Alva, minor Jocelyne Alva.

[3] The individual board members include George Van Alstine, George Padilla, Jacqueline Jacobs, Bonnie Armstrong, and Lisa Fowler.

summary judgment on the grounds that the plaintiffs lack Article III standing. Plaintiffs cross-appeal the district court's dismissal of their state law damages claim.

We reverse the order of the district court granting summary judgment for the plaintiffs and dismiss all of plaintiffs' claims for failure to establish Article III standing.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Summary*

This case concerns PUSD's use of weighted lotteries in its magnet school admissions process in an effort to improve the fairness of voluntary pupil assignments and to maintain student body diversity, without sacrificing eligibility for state and federal desegregation funding. In January 1970, PUSD received the dubious distinction of being the first non-Southern school district to be placed under a consent decree by a federal district court in order to remedy de jure racial segregation within its public school system. *Spangler v. Pasadena City Bd. of Educ.*, 311 F.Supp. 501 (C.D.Cal.1970). The court's injunction resulted in a radical restructuring of school attendance zones throughout the city, known as the Pasadena Plan.

The injunction lasted for nine years until PUSD was declared unitary and released from judicial supervision by order of this court. 611 F.2d 1239 (9th Cir.1979). We overruled the district court's exercise of its equitable discretion to maintain jurisdiction over the District's integration plan based in part upon the Board's "representations that it would continue to engage in affirmative action in the future in support of integration." *Id.* at 1241. As a result, PUSD formed its first voluntary integration plan in 1980, updating the plan twice in the 1990s to respond to demographic shifts in the district's population.

Consistent with its goal of providing an integrated public education environment, PUSD currently operates three magnet, or voluntary, schools: Don Benito Fundamental School ("Don Benito") including students in grades kindergarten through five, Norma Coombs Alternative School ("Norma Coombs") including students in grades kindergarten through eight, and Marshall Fundamental School ("Marshall") including students in grades six through twelve. Although every PUSD student is assigned to a neighborhood school, a student may also apply voluntarily to one or more of the voluntary schools, so long as the individual school's curriculum covers the student's present grade. The opportunity for superior academic performance and special resources make admission to the voluntary schools desirable for students who are willing to forgo the convenience of attending neighborhood schools.

On March 24, 1998, the Board approved its Integration Policy and Quality Schooling Plan, thereby amending Board Policy 0460.[4] According to the policy, the Board instituted a lottery system for assigning students to the voluntary schools, to be used only if a school received more applications than it had available spaces.[5] The Board amended its voluntary

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[4] The Policy provides in relevant part: The District shall recruit a diverse applicant pool, monitor the applicant pool, and target recruiting as appropriate. First consideration will also be given to the fact that some applicants may have siblings attending a voluntary or magnet school. When necessary to create an integrated setting, consideration will be given during the student assignment process to several factors, including gender, race, or ethnicity, socioeconomic status, language and special educational needs. BP 0460(d) ¶ 8.

[5] The policy also provided, with regard to non-voluntary schools, that each student would be assigned to a school on the basis of his or her home address. Students were permitted to request transfers to other neighborhood schools and permits to attend voluntary schools. These transfers and permits were conditioned on a determination of adequacy in each school's enrollment capacity, and transferring students were not permitted to dis-

admissions procedures in response to complaints from parents who were previously required to wait in line in order to secure a place for their children on a "first come, first served"

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place students residing within a school's attendance zone. Finally, the policy provided that:

> At sites where the number of students of any major ethnic group varies from the percentage of such students in the overall District student population by +/20%, no additional permits or transfers from this group may be granted into these sites.
>
> PUSD, Integration Policy and Quality Schooling Plan, Board Policy 0460(c) ¶ 3 [hereinafter "Board Policy 0460(c) ¶ 3"].

Scott has called Board Policy 0460(c) ¶ 3 to our attention in her answering brief, intending to demonstrate that PUSD practiced racial discrimination even in instances where it did not apply the challenged lottery. However, the district court's ruling did not address this aspect of the policy. Judge Tevrizian specifically limited his permanent injunction to prohibit the use of race, ethnicity or gender in any future lottery. Mem. Order (Feb. 7, 2000) at 28 (enjoining the use of these criteria as provided by Board Policy 0460(d) ¶ 8). The court's grant of summary judgment as to "all of [Scott's] causes of action," Mem. Order at 27, addresses Scott's claims of racial and gender discrimination brought under the state and federal constitutions as against the lottery process; the order included no ruling on the transfer policy, and Scott has alleged no facts below supporting her standing to challenge the transfer policy. She has also failed to allege any facts from which we might ascertain the relationship, if any, between Board Policy 0460(c) ¶ 3 and the lottery process described at Board Policy 0460(d) ¶ 8.

Moreover, Scott does not appeal the district court's failure to rule on this issue. Rather, she attempts to introduce new arguments before this court without support from any facts established below. We decline to hear them. See *Law Offices of Jonathan A. Stein v. Cadle Co.*, 250 F.3d 716, 718 n. 3 (9th Cir.), cert. denied, *Welty v. United States*, __ U.S. __, 122 S.Ct. 215, 151 L.Ed.2d 153 (2001) (rejecting the government's attempt to raise new arguments on appeal); *see also Crawford v. Lungren*, 96 F.3d 380, 389 n. 6 (9th Cir.1996) ("The district court is not merely a way station through which parties pass by arguing one issue while holding back a host of others for appeal.").

basis. When the number of students applying for admission to any particular voluntary school exceeded the number of available spaces, the policy first gave priority to siblings of students already enrolled at the school. If spaces remained available after siblings had been admitted, any remaining unassigned students were to be chosen through a computerized lottery.

Once the Board determined that a lottery was appropriate with regard to any particular school, the policy would permit PUSD to weigh gender, race or ethnicity, socioeconomic status, language, and special needs as factors within the lottery process for admission to that school. According to the policy, these factors could only be considered "when necessary to create an integrated setting." Board Policy 0460(d) ¶ 8. The use of these factors was further restricted to the selection of students for the entering grades of each voluntary school.

Parents were informed of the amended policy by a letter from Superintendent Vignes, dated November 30, 1998. The amended policy was to go into effect beginning with applications submitted in the spring of 1999 for the 1999-2000 school year. The Board provided a three-month window for the submission of applications, opening on January 4, 1999, and closing on March 12, 1999.

In February 1999, before the revised admissions policy had been implemented at any voluntary school, Vignes presented a report to the Legislative Council of the California Legislature, documenting the use of state-provided, voluntary desegregation funding by PUSD. The report was required by state law governing the use of desegregation funding.[6] In order to maintain eligibility for state voluntary desegregation funding, PUSD was required to demonstrate how programs

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[6] *See* Act of August 21, 1998, 1998 Cal. Stat. 324 (state budget act).

receiving funding worked both to alleviate the harmful effects of racial segregation and to improve student academic performance.[7]

In her report, Vignes recounted the District's history of judicial supervision and proclaimed the District's continuing obligation to integrate its public schools. In addition, Vignes presented statistical showings that PUSD's voluntary schools, as well as other schools receiving desegregation funding to support their student transportation programs, consistently outperformed schools that based their enrollment strictly on neighborhood attendance zones. Finally, Vignes represented the lottery system for voluntary school admission as a new amendment to PUSD's longstanding integration policy, furthering the District's effort to comply with state funding requirements.

On April 7, 1999, PUSD conducted lotteries for two of the three voluntary schools, Don Benito and Norma Coombs. Marshall High School, which did not run a deficit of available spaces in 1999, admitted all student applicants without resorting to a lottery. The two minor plaintiffs (Kalya Hunter and Michaela Reyes) who applied to Marshall were admitted for the 1999-2000 school year. In addition, three plaintiffs (Jocelyne Alva, Ronald Rucker, and Detrick Standmore) did not apply to any voluntary school for the 1999-2000 academic cycle.

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[7] School districts were authorized by state law to restrict intradistrict student transfers in order "to maintain appropriate racial and ethnic balances." Cal. Educ.Code § 35160.5(b)(2)(A) (1996). The same legislation required school districts to craft admissions policies for oversubscribed schools "that ensure[ ] that selection of pupils to enroll in the school is made through a random, unbiased process," thereby prohibiting academic and athletic performance-based pupil assignment except with regard to specialized schools or programs "if the [selective] criteria are uniformly applied to all applicants." *Cal. Educ.Code* § 35160.5(b)(2)(B) (1996).

No minor plaintiff applying to either Norma Coombs or Don Benito was subjected to a lottery process that used race, ethnicity, gender or any other student characteristic as a factor because the applicant pools were determined to be broadly representative of the District's overall student population.[8] Two minor plaintiffs (Camden René Amy and Marissa Laraine Amy) applied to Norma Coombs, but they simultaneously informed PUSD that they intended to attend Woodrow Wilson Middle School if that school was able to assemble its International Baccalaureate Program. Because the aforementioned program was established for the 1999-2000 school year, their applications were withdrawn from Norma Coombs. Finally, the remaining minor plaintiff (George MacPherson) applied to Don Benito, was included in the lottery process held in April 1999, and was not selected.

B. *Procedural History*

Scott filed the first amended complaint in this case on March 29, 1999. PUSD responded with a motion to dismiss, arguing that Scott lacked standing to challenge the lottery process. The district court denied that motion, concluding that dismissal based on lack of standing was premature, but providing the defendants leave to pursue the issue at summary judgment. In August 1999, the parties entered an agreement to take limited discovery prior to summary judgment, providing for a second discovery phase if summary judgment was not dispositive.

On December 7, 1999, the defendants filed a motion for summary judgment, again alleging that the plaintiffs lacked

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[8] Joseph White, who designed the computer software that performed the admission lottery and personally oversaw the operation of the lottery, provided uncontroverted testimony that the lottery "did not take into consideration race, ethnicity, color, national origin or gender of the students because the applicant pool was balanced." Decl. of Joseph White (May 11, 1999) at ¶ 10.

Article III standing. Scott filed a cross-motion for summary judgment on all claims, except the damages claim under the Unruh Act.

The district court denied the defendants' motion, holding that the revised lottery provisions of the policy constituted a denial of equal treatment sufficient to satisfy the injury-in-fact requirement for *Article III* standing. The court further held that "whether or not Plaintiffs actually suffered racial discrimination is immaterial" because the plaintiffs were "ready and able" to apply to the voluntary schools in the future and "a discriminatory policy prevented [them] from doing so on an equal basis." Mem. Order (Feb. 7, 2000) at 12. The court concluded that "[t]he language of BP 0460(d)(8), render[ed] untenable Defendants' position that places were assigned in a race-, ethnic-, or gender-neutral manner," because, in order to determine whether an adjustment of the random lottery process is necessary to promote integration, the Board must "always keep[ ] an eye on the applicant pool to make sure it is a fair representation of the PUSD's racial, ethnic or gender make-up as a whole." *Id.* at 15. The defendants currently appeal the district court's denial of their motion for summary judgment as well as its grant of summary judgment for the plaintiffs.

Although the court issued an injunction against future enforcement of BP 0460(d) ¶ 8 to the extent that it considered race, ethnicity, or gender, it did not invalidate the results of the 1999 admissions process. Following the court's filing of its order on February 7, 2000, PUSD suspended enforcement of the policy. PUSD took this action before making any pupil assignments for the 2000-2001 school year.

On March 20, 2000, the district court issued an order *sua sponte* dismissing Scott's claims for damages under the Unruh Act for failure to state a claim. Scott currently appeals the district court's dismissal of the state law damages claim.

II. STANDARD OF REVIEW

We review the district court's order granting summary judgment de novo. *See Clicks Billiards Inc. v. Sixshooters, Inc.*, 251 F.3d 1252 (9th Cir.2001); *Robi v. Reed*, 173 F.3d 736, 739 (9th Cir.1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In reviewing summary judgment, we "must determine whether the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issues of material fact and whether the district court correctly applied the law." *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), cert. denied, 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996); *see also Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1290 (9th Cir.1982) (holding that the same standard applies for review of denial of summary judgment).

Because "[a] district court's decision to grant a permanent injunction involves factual, legal, and discretionary components," we evaluate such a decision under three different standards of review. *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir.1998). We review the district court's legal conclusions de novo. *Id.* Any factual findings supporting the decision to grant the injunction will be reviewed for clear error. *Id.* We review the scope of the injunction for abuse of discretion. *Id.* However, the district court may not rely on factual findings made incident to the issuance of a permanent injunction when deciding a motion for summary judgment. *See* Fed.R.Civ.P. 52(a) (stating that findings of fact are unnecessary on decisions of motions under *Rule 56*); *Rand v. Rowland*, 154 F.3d 952, 957 n. 4 (9th Cir.1998) (*en banc*) (stating that "[a] district court does not, of course, make 'findings of fact' in ruling on a summary judgment motion"

(internal quotation marks and citation omitted)); *Bothke v. Fluor Eng'rs & Constructors, Inc.*, 834 F.2d 804, 810 (9th Cir.1987) (stating that the "district court was not entitled to make findings of fact" at summary judgment and holding, therefore, that a prior panel in the same case "erred in applying the 'clearly erroneous' test of Fed.R.Civ.P. 52(a)"); *see also Country Floors v. P'Ship of Gepner & Ford*, 930 F.2d 1056, 1062 (3d Cir.1991) (holding that factual determinations made in ruling on a motion for a preliminary injunction cannot be used to decide summary judgment).

III. DISCUSSION

The district court found that Scott had standing to bring a federal equal protection challenge against the District's voluntary school admissions policy. The court then ruled that the policy's authorization of the use of race, as an admissions factor in certain circumstances, violated the test of strict scrutiny under the Equal Protection Clause, U.S. Const. amend. XIV, § 1; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor ... are constitutional only if they are narrowly tailored measures that further compelling governmental interests"), and similarly violated state constitutional law, Cal. Const. art. I, § 31. The court also ruled that the policy's authorization of the use of gender as an admissions factor violated equal protection, by failing to satisfy the test of intermediate scrutiny, *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (holding that gender classifications "must serve important governmental objectives and must be substantially related to those objectives"), and similarly violated state law.

The defendants continue to challenge standing on appeal. We conclude that the mere existence of the admissions policy, standing alone, is insufficient to satisfy the

requirement of Article III standing and that, therefore, we lack jurisdiction over Scott's state and federal claims.

A. *Article III* Standing

We must establish jurisdiction before proceeding to the merits of the case.[9] "Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (internal quotation marks and citations omitted); accord *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The federal courts are "courts of limited jurisdiction that have notbeen vested with unlimited open-ended law-making powers." *Northwest Airlines, Inc. v. Trans. Workers*, 451 U.S. 77, 95, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981). Rather, our jurisdiction is circumscribed by the "case or controversy" requirement of Article III standing and by prudential considerations, such as ripeness,[10] that arise as we navigate constitutional limitations on our judicial power. U.S. Const. art. III; *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138-42 (9th Cir.2000) (*en banc*) (discussing the constitutional and prudential elements of the standing and ripeness doctrines).

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[9] "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868).

[10] The ripeness issue will be discussed below. See infra Section III.B.

The requirement of *Article III* standing is a core component of the separation of powers. *See Citizens for a Better Env't*, 523 U.S. at 101, 118 S.Ct. 1003; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The standing doctrine aids the federal judiciary to avoid intruding impermissibly upon the powers vested in the executive and legislative branches, by preventing courts from issuing advisory opinions not founded upon the facts of a controversy between truly adverse parties. *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

In order to establish standing, a plaintiff must first show that she has suffered an "'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks and citations omitted). Second, the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (internal quotation marks omitted). Third, "it must be 'likely,' as opposed to merely 'speculative,'" that the injury is remediable by appropriate court action. *Id.* at 561, 112 S.Ct. 2130.

In an action challenging the constitutionality of racial and gender classifications,[11] the defendant bears the ultimate

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[11] We will assume arguendo that an authorization to consider racial and gender factors in the allocation of a public benefit is a racial or gender classification for equal protection purposes even though the challenged admissions policy designates no specific racial or gender group to be the beneficiary of additional consideration in its weighted lottery process. A policy that does not nominate particular groups for special consideration defies the Supreme Court's rationale for applying the suspect classification doctrine, because such a policy does not single out any particular group for disparate treatment. *See, e.g., Adarand, supra* (applying strict scrutiny to federal funding incentives to contractors hiring subcontracting companies controlled by "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities"); see also

burden of proving that the classifications satisfy strict and intermediate scrutiny respectively. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 509-11, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (discussing strict scrutiny); *United States v. Virginia*, 518 U.S. 515, 531, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (discussing intermediate scrutiny). However, before the burden shifts to the defendant to make such a showing, the plaintiff must first satisfy her burden of demonstrating that she has standing to make the constitutional challenge. *Adarand*, 515 U.S. at 210-11, 115 S.Ct. 2097. The burden of establishing Article III standing remains at all times with the party invoking federal jurisdiction. *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130; *see also Warth v. Seldin*, 422 U.S. 490, 518, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.").

Our principal task is to determine whether Scott faces "a realistic danger of sustaining a direct injury as a result of the [policy]'s operation or enforcement," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), or "whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction," *Thomas*, 220 F.3d at 1139 (citing *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301). We must consider the facts as they existed at the time that the complaint was filed. *Clark v. City of Lakewood*, 259

Croson, supra (municipal funding plan, requiring prime government contractors to set-aside 30% of public funding to minority-owned subcontractors and defining minorities as "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (separate university admissions system advantaging "Black," "Chicano," "Asian," and "American Indian" applicants); *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943) (curfew applicable only to persons of Japanese ancestry).

F.3d 996, 1006 (9th Cir.2001); *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed."); *accord Lujan*, 504 U.S. at 570 n. 4, 112 S.Ct. 2130. Scott filed her first amended complaint roughly one week before PUSD conducted lotteries for admission to Don Benito and Norma Coombs in April of 1999. Because the lottery provision of the District's integration policy had never been executed before that time, Scott could not have known (1) whether the racial or gender provisions of the policy would be applied, (2) how they would be applied, or (3) whether any of the individual plaintiffs would be disadvantaged by their application (as opposed to actually receiving admission to a voluntary school because race or gender were taken into account).[12] Of course, when the District subsequently conducted the lotteries, race was not considered as an admissions factor.

As the Supreme Court stated in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness," *id.* at 190, 120 S.Ct. 693. The present case represents one such circumstance. Because PUSD discontinued its use of the

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[12] We stress that it is not the imminence of the admission process that is at issue in this case (*i.e.*, not the mere fact that PUSD was poised to operate its yearly admissions procedures), but the imminence of the District's application of the challenged provisions of the policy. Although not made clear in the record, the individual minor plaintiffs appear to be of different racial and ethnic backgrounds, as well as different genders. As a result, at the time the complaint was filed, individual plaintiffs could not have known that they would not be benefitted by implementation of the challenged provisions of the policy.

weighted lottery system in response to a court order,[13] the possibility of future injury is not speculative enough to establish mootness. Nevertheless, it is too weak to support standing.

"The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of *Article III*." *Stoianoff v. Montana*, 695 F.2d 1214, 1223 (9th Cir.1983); *Western Mining Council v. Watt*, 643 F.2d 618, 627 (9th Cir.1981); *see also Thomas*, 220 F.3d at 1139 (stating that "neither the mere existence of a prospective statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement."). A plaintiff must satisfy the injury-in-fact requirement by alleging that she "has suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *O'Shea v. Littleton*, 414 U.S. 488, 493, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973)). A plaintiff may allege a future injury in order to comply with this requirement, but only if he or she "is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury is both real and immediate, not conjectural or

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[13] Scott's entire challenge might have become moot if PUSD had voluntarily discontinued the use of its weighted lottery system in response to a change in federal or state law. *See, e.g., Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir.2000) (holding that federal constitutional challenges to the University of Washington Law School admissions process had become moot because Washington State law had been altered to ban preferential treatment on the basis of race by governmental actors and the school had responded to this statutory change by discontinuing the use of race in its admissions process). However, PUSD created its weighted lottery system in 1998, after the passage of the state constitutional amendment under which Scott currently challenges the policy.

hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal quotation marks and citations omitted).

An action will be moot only if "[a] determination . . . of the legal issues tendered by the parties is no longer necessary to compel . . . and could not serve to prevent" the action from which one party seeks relief. *DeFunis v. Odegaard*, 416 U.S. 312, 317, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); *see also Allard v. DeLorean*, 884 F.2d 464, 466 (9th Cir.1989) (stating that a federal court has no jurisdiction to hear a case that cannot affect the litigants' rights). Here, a ruling on the merits might still impact the rights of individual plaintiffs who remain eligible to apply to PUSD voluntary schools at some future date. Some of Scott's claims, in other words, remain redressable and, therefore, are not moot. *DeFunis*, 416 U.S. at 317, 94 S.Ct. 1704.

Eligibility to apply for a permit to a voluntary school for minor plaintiffs Alva, Amy, Hunter, Larraine, Reyes, and Rucker has ended during the life of this litigation. These plaintiffs are now no longer able to satisfy the redressibility requirement of Article III standing, and, as a result, their claims are now moot.[14] Minor plaintiffs Standmore and MacPherson remain eligible to apply to PUSD's voluntary schools in the future.[15] Therefore, claims brought on behalf of these two plaintiffs are not moot.

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[14] We note that, although the defendants refer in their opening brief to Alva as another legitimate applicant to Marshall, his eligibility was limited to the 2001-2002 academic cycle, the application deadline for which has since passed.

[15] Only MacPherson can credibly allege that he was harmed by the lotteries used during the 1999-2000 admissions cycle, since only he applied for and failed to receive admission to a school for which a lottery was conducted. However, MacPherson cannot demonstrate harm caused by the provisions of the policy challenged in this lawsuit, because no weighted factor of any kind was used in any lottery conducted in 1999.

Scott's claim that the policy denies her equal protection of the laws properly alleges an invasion of a legally protected interest, and that interest is "particularized" as to individual plaintiffs who remain eligible to apply to PUSD's voluntary schools.[16] However, Scott cannot establish the standing of any individual plaintiff without demonstrating a "genuine threat" of adverse treatment due to the policy's imminent enforcement, *Stoianoff*, 695 F.2d at 1223, and she has failed to concretely establish that any specific harm will likely befall any specific plaintiff. As stated above, Scott has provided no evidence tending even to show that a particular plaintiff will not be benefitted rather than harmed by the defendant's future implementation of the challenged provisions of the admissions policy.

In *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993), the Supreme Court held that " 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 666, 113 S.Ct. 2297. Scott has misconstrued this statement to mean that the hypothetical existence of a racial or gender barrier is enough, without a plaintiff's showing that she has been, or is genuinely threatened with the likelihood of being, subjected to such a barrier. In fact, the Court's holding means simply that an equal protection plaintiff need not establish standing by demonstrating that, but for the condition challenged as unconstitutional, she would have obtained a particular benefit. *See, e.g., id.* (stating that "in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on an equal footing in the bidding

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[16] This interest is not particularized as to individual plaintiffs who have already suffered an injury due to the imposition of a racial or gender barrier to their admission to any of the voluntary schools because, as explained above, there are no such plaintiffs.

process, not the loss of a contract"). Likewise, the individual plaintiffs in the present action are not required to demonstrate that but for the weighted lottery process they would obtain admission to one of the voluntary schools. They need only demonstrate that they are ready and able to apply for admission and that the policy threatens to prevent them from applying on an equal basis with other student applicants. We deny standing because Scott has failed to demonstrate an imminent threat of enforcement of any racial or gender classification against any individual plaintiff's application to one of the voluntary schools and because, even if such a threat were imminent, Scott has failed to demonstrate that any plaintiff would suffer a barrier to her application.

Scott sought and received forward-looking relief in the form of a declaratory judgment and an injunction from the district court against PUSD, permanently prohibiting the school district from using race and gender as factors in the admissions practices of its voluntary schools. Under the Declaratory Judgment Act, 28 U.S.C. § 2201, a plaintiff must establish standing by showing "that there is a substantial controversy, between parties having adverse interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment." *Watt*, 643 F.2d at 624 (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)); *see also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 81 L.Ed. 617 (1937) (stating that declaratory injunctive relief may be appropriate "[w]here there is . . . a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged"). The Supreme Court has clarified, with regard to claims seeking prospective relief under the Equal Protection Clause, that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too

speculative for *Article III* purposes—that the injury is 'certainly impending.'" *Adarand*, 515 U.S. at 211, 115 S.Ct. 2097 (*quoting Lujan*, 504 U.S. at 565 n. 2, 112 S.Ct. 2130).

Scott must support her claim for prospective relief by presenting evidence that individual plaintiffs are ready and able to apply to the voluntary schools and that the PUSD policy prevents them from doing so "on an equal basis." *See Associated Gen. Contractors*, 508 U.S. at 666, 113 S.Ct. 2297. The district court concluded from the language of BP 0460(d) ¶ 8 that "[p]laintiffs may not compete on equal ground with other students for all of the seats at the three schools in question."[17] Mem. Order at 15 (first emphasis added). The court's use of conditional language is a tacit acknowledgment that the injury alleged here is far too speculative to satisfy the injury-in-fact requirement of Article III standing.

Scott attempts to fulfill the injury-in-fact requirement on two grounds. First, Scott alleges that PUSD did in fact subject the plaintiffs to a race- and gender-based admissions process when it monitored the racial and gender composition of the applicant pools for the three schools to which individual plaintiffs applied. Scott alleges that, insofar as PUSD continues to perform this monitoring function, it maintains an unconstitutional barrier to individual plaintiffs' admission to the voluntary schools. The district court agreed

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[17] Contrary to the district court's conclusion, the present case involves neither a limitation on the number of seats made available to students of a particular racial or gender group nor a classification of students by race or gender in order to move them into separate lottery cohorts whereby students of a particular group would not be required to compete with out-group members for available seats. Cf., *e.g.*, *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 316-17 (4th Cir.2001) (describing defendant school board's practice of assigning students to its magnet schools by using two parallel lotteries, one for African American students and one for students of other races).

with this argument, but its ruling is anomalous. Although the district court found that PUSD "assigned students to the voluntary schools in a race- neutral manner for the 1999/2000 school year," the court concluded that it was "logically impossible" for the lotteries to have been run in such a manner because PUSD was required to monitor the racial composition of each applicant pool in order to determine whether race should be applied as a corrective admissions factor. Mem. Order at 15. The court's legal conclusion cannot be squared with its own factual findings.[18]

Indeed, the conclusion that PUSD's monitoring practices, standing alone, prevent the plaintiffs from applying to the voluntary schools on an equal basis (even though all applicants were subjected to the same monitoring practices)[19] places an unnecessary and impractical strain on the *Article III* standing requirement that the plaintiff show a concrete and particularized injury. *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130; *Warth*, 422 U.S. at 508, 95 S.Ct. 2197. *See also Fla. Audubon Society v. Bentsen*, 94 F.3d 658, 667 n. 4 (D.C.Cir.1996) ("[T]he plaintiff must show that he is not simply injured as is everyone else, lest the injury be too general for court action, and suited instead for political redress."). Neither Scott nor the district court has given any plausible account of the "particularized" harm allegedly caused by monitoring the applicant pool's racial and gender composition.[20] Rather, the

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[18] We find no clear error in the district court's factual determination that 1999-2000 lotteries for admission to Norma Coombs and Don Benito were performed in a neutral manner, but reject its legal conclusion that the monitoring of racial stratification within each applicant pool is enough to establish injury in fact.

[19] There are no facts, for example, that only students of a particular race were required to disclose their race during the application process.

[20] We note that Scott has made no argument that individual plaintiffs in any way conformed their conduct due to the threat of the policy's potential application to their future candidacy for voluntary school enrollment. *Cf. Clements v. Fashing*, 457 U.S. 957, 962, 102 S.Ct. 2836,

court seemed to hypothesize that once PUSD had monitored the applicant pool's composition, the implementation of a suspect classification was a fait accompli. This conclusion is contradicted by the facts of this case and fails to distinguish monitoring from the actual weighting of race or gender in a lottery. The court failed to consider, for example, whether the putative harm of monitoring would attach even if the District were not authorized to perform a weighted lottery to compensate for imbalances. We must conclude from the district court's opinion that monitoring is presumed to cause injury only because it might result in the implementation of a weighted lottery. We find this hypothetical injury too speculative to support standing.

Second, Scott argues that the future imposition of a racial or gender weighted lottery will pose an unconstitutional barrier to the plaintiffs' admission to PUSD voluntary schools.[21] However, Scott has failed to establish a genuine threat of enforcement on the basis of which this court could evaluate the policy's constitutionality.

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73 L.Ed.2d 508 (1982) (ruling that plaintiffs had standing to challenge a Texas statute governing eligibility for election to the state legislature, even though it had not yet been applied to them, because they had withheld their bids for candidacy because the statute designated them ineligible); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986) (invalidating state abortion regulations as an attempt "to intimidate women into continuing pregnancies," even though the regulations had never been put into effect); *see also AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 386, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (stating that if "there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements").

[21] This argument by Scott, because it chiefly revolves around a question of the proper time to bring a challenge to the PUSD policy, implicates prudential aspects of our ripeness doctrine as well as the injury-in-fact component of constitutional standing. We will address the issue of ripeness in greater detail below. See infra Section III.B.

In *Thomas v. Anchorage Equal Rights Commission*, an en banc panel of this court denied plaintiff landlords' standing to bring a First Amendment challenge against an Alaska housing law prohibiting discrimination on the basis of marital status. The *Thomas* panel created a three-pronged test by which a plaintiff may establish standing for prospective relief from an allegedly discriminatory governmental policy. First, the plaintiff must articulate a "'concrete plan' to violate the law in question." 220 F.3d at 1139. Scott presented affidavits before the district court representing the intentions of individual plaintiffs to apply to PUSD voluntary schools during the earliest available application cycle. However, a pledge of general intent to place oneself within the purview of a challenged policy that fails to "specify . . . under what circumstances" that policy might be enforced will "not rise to the level of an articulated, concrete plan." *Id.*

The *Thomas* panel ruled that "[t]he landlords' expressed 'intent' to violate the law on some uncertain day in the future—if and when an unmarried couple attempts to lease one of their rental properties—can hardly qualify as a concrete plan." *Id.* at 1140. Like the landlord plaintiffs in *Thomas,* Scott's professed intention to subject herself to a racial or gender weighted lottery is contingent upon an unpredictable set of societal factors that may or may not arise, and thereby trigger the implementation of a weighted lottery, when an individual plaintiff's application for admission to a voluntary school is made. At the next opportunity for a plaintiff to make an application, that student may be subjected to a weighted lottery, or no lottery may be conducted because no school is oversubscribed, or a lottery may be conducted at one or more schools but it may apply no weighted factor. Scott cannot base her plan to incur actual, constitutional injury upon this insurmountable contingency.[22]

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[22] Cf. *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 163, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967) (finding a pre-enforcement challenge to

Second, a plaintiff may satisfy the injury-in-fact requirement by demonstrating that government officials "have communicated a specific warning or threat" of enforcement. *Id.* The *Thomas* panel reiterated that the threat of enforcement "must at least be 'credible,' not simply 'imaginary or speculative.'" *Id.* (quoting *Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301). PUSD has given no indication that it intends to apply a weighted factor in any future lottery. That is, the District has not represented to parents that it expects any future applicant pool to be so grossly out of balance with the district-wide student population that the application of a corrective racial or gender factor is imminent. To the contrary, PUSD Superintendent Vignes has stated that race or ethnicity would be applied as an admissions factor only under "compelling" circumstances "where [a] school was so racially identifiable that it was a segregated school or was fast moving in the direction of becoming a segregated school." Decl. of Vera Vignes (Jan. 24, 2000) ¶ 11. Vignes further qualified her assessment by stating that PUSD "ha[s] not yet faced [such] a situation." *Id.* Scott offers no contravening evidence. Thus, her assessment that BP 0460(d) ¶ 8 *661 threatens a racial or gender-based admissions process in the near future at PUSD voluntary schools is purely speculative.

Third, the *Thomas* panel held that a claim for prospective relief can be based on a history of discriminatory enforcement of the challenged governmental policy, but the absence of such a history will support a conclusion that a potential injury

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FDA regulation unripe because "[t]he regulation serves notice only that the Commissioner may under certain circumstances order inspection of certain facilities and data, and that further certification of additives may be refused to those who decline to permit a duly authorized inspection until they have complied in that regard"). The Supreme Court particularly noted in *Toilet Goods* that it "ha[d] no idea whether or when . . . an inspection will be ordered and what reasons the Commissioner will give to justify that order." *Id.*

is not imminent.[23] 220 F.3d at 1140. Thus, the fact that no individual plaintiff has yet been subjected to a race or gender discriminatory admissions qualification under the policy weakens Scott's claim of standing to seek prospective relief insofar as the lack of prior implementation of the policy leaves us without a basis upon which to infer that the threat to Scott is genuine. *See also Lyons*, 461 U.S. at 102, 103 S.Ct. 1660 ("Past wrongs [are] evidence bearing on 'whether there is a real and immediate threat of repeated injury.'") (quoting *O'Shea*, 414 U.S. at 496, 94 S.Ct. 669).

In *City of Los Angeles v. Lyons*, the Supreme Court held that a plaintiff lacked standing to obtain an injunction against the Los Angeles Police Department, barring it from using choke-holds in the future, even though the plaintiff himself had previously been subjected to this police tactic, because the plaintiff could not establish the likelihood that he would be subjected to such treatment in the future. The Court instructively described the difference between the injury requirement for standing to sue for damages and standing to obtain injunctive relief, stating "[t]hat Lyons may have been illegally choked by the police . . . while presumably affording Lyons standing to claim damages . . . does nothing to establish a real and immediate threat that he would again be stopped [for any offense], by an officer or officers who would illegally choke him." *Id.* at 105, 103 S.Ct. 1660. Scott presents an even weaker claim of standing in that she can

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[23] Here, the PUSD policy was implemented during the admissions process for the 1999-2000 school year to the extent that lotteries were used at two of the voluntary schools, but it has not been implemented since. During the one year of its use, the policy did not result in the consideration of either race or gender as an admissions factor because the applicant pools for both oversubscribed schools were determined to be "balanced."

establish neither past adverse treatment by an illegal practice nor real and immediate threat that she will be victimized by such a practice in the future.

The district court's ruling permits Scott to proceed to a constitutional ruling against PUSD and the Board's admis sions policy without requiring any showing either that the offending policy has ever been applied against any of the named minor plaintiffs or that it will ever be so applied. The district court's ruling purports to determine that the plaintiffs had standing because they alleged that they faced a barrier in admissions; the court's ruling in fact permits the plaintiffs to bring suit without alleging that such a barrier was erected against them, but merely by alleging that it could be (at some unspecified time in the future, under some unspecified condition). The breadth of the district court's ruling provides an example of why careful adherence to the Article III case or controversy requirement is essential to the exercise of our judicial function.

Whether or not a discriminatory barrier will be erected in the future by PUSD against any student applicant (let alone one of the plaintiffs) in the form of a race-based admissions policy is too speculative to satisfy the plaintiffs' burden of demonstrating a realistic and imminent danger of direct injury as a result of the PUSD policy. Accordingly, we dismiss Scott's claims for lack of standing.

B. *Ripeness*

We are further persuaded that, even if Scott were found to have established injury in fact, we would still dismiss her equal protection claim based on the prudential considerations of our ripeness jurisprudence. "[R]ipeness doctrine is drawn both from *Article III* limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). "In 'measuring whether the

litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing.'" *Thomas*, 220 F.3d at 1139 (quoting *Gene R. Nichol, Jr., Ripeness and the Constitution*, 54 U. Chi. L.Rev. 153, 172 (1987)). As a prudential matter, we will not consider a claim to be ripe for judicial resolution "if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257, 140 L.Ed.2d 406 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)); accord *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044 (9th Cir.1999).

The "basic rationale" of the ripeness doctrine is "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Labs.*, 387 U.S. at 148, 87 S.Ct. 1507. To determine ripeness, we must consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149, 87 S.Ct. 1507.

The prudential considerations of ripeness are amplified where constitutional issues are concerned. *Mitchell*, 330 U.S. at 90-91, 67 S.Ct. 556 ("Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of the political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches."); *see also Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345-48, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (establishing the rule that it is always prudent to avoid passing unnecessarily on an undecided constitutional question); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-55, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring) (stating that federal courts "do not review issues, especially

constitutional issues, until they have to"). The Supreme Court has neatly instructed that the jurisdiction of the federal courts to hear constitutional challenges should be exercised only when "the underlying constitutional issues [are tendered] in clean-cut and concrete form." *Rescue Army v. Mun. Ct. of Los Angeles*, 331 U.S. 549, 584, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947). Therefore, particularly where constitutional issues are concerned, problems such as the "inadequacy of the record," *Int'l Bhd. of Teamsters v. Denver Milk Producers Inc.*, 334 U.S. 809, 68 S.Ct. 1015, 92 L.Ed. 1741 (1948) (mem.), or "ambiguity in the record," *Simmons v. W. Haven Hous.*, 399 U.S. 510, 511, 90 S.Ct. 1960, 26 L.Ed.2d 764 (1970) (per curiam), will make a case unfit for adjudication on the merits.

The constitutional issues in this case remain woefully unfit for adjudication. The defendants initially challenged plaintiffs' standing on a motion to dismiss before the district court. The court concluded that dismissal on standing grounds was premature, due to limited factual development, and instead instructed the parties that the standing challenge could be properly raised on a motion for summary judgment. Facing the possibility that the action might still be dismissed at summary judgment for lack of standing, the parties agreed to engage in limited discovery, reserving the option of second discovery phase to follow summary judgment. On the basis of that limited discovery, the district court granted summary judgment for the plaintiffs.

To satisfy equal protection analysis, a racial classification must be narrowly tailored to serve a compelling governmental interest. *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097. Gender classifications must be substantially related to important governmental objectives. *Craig*, 429 U.S. at 197, 97 S.Ct. 451. Here, the Board has attempted to comply with the requirements of equal protection by authorizing the use of race and gender as admissions factors only "when necessary

to create an integrated setting." Board Policy 0460(d) ¶ 8. The Board did not exclusively authorize these two factors, but instructed that language, socioeconomic status, and special educational needs could also be used as admissions factors for the same limited purpose. To what degree PUSD would resort to the use of non-suspect factors before suspect factors or would use targeted recruiting to obviate the need for a weighted lottery at all is a question vital to the resolution of the constitutional issues but unanswerable under the present posture.

The district court's ruling on Scott's equal protection claims abstracted this case from its proper factual context, and, as a result, it is inconsistent with the Supreme Court's instruction that strict scrutiny should not be "fatal in fact." *Adarand*, 515 U.S. at 237, 115 S.Ct. 2097; *see also Croson*, 488 U.S. at 519, 109 S.Ct. 706 (Kennedy, J., concurring) ("[A] rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test."). Currently, we have no basis from which to infer how racial or gender criteria might correlate with other criteria, such as socio-economic status and language, in PUSD's actual implementation of the challenged policy. For example, we know neither if the weighted lottery system will allow for PUSD to make significant racial adjustments in its student body by considering non-suspect criteria, either in tandem with or instead of racial criteria, nor if the district would give deference to non-suspect criteria in order to circumscribe its consideration of race to conform to the requirements of narrow tailoring.[24] Moreover, even if the parties had engaged

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[24] We do not even know under what conditions PUSD deemed the use of racial and gender admissions criteria unnecessary, since neither party has introduced into evidence statistics by which the applicant pool for any voluntary school could be compared, in terms of its racial and gender

in a second discovery phase, it is unlikely that a sufficient factual basis for adjudication could have been laid relying upon the single academic cycle during which the challenged policy was in effect but did not result in the use of any weighted admissions factor.

Without knowing the conditions under which such a policy is to be implemented, no court can make a true determination as to whether the policy as practiced uses race in a way that is necessary to satisfy the compelling interest of student-body diversity. *Bakke*, 438 U.S. at 313-17, 98 S.Ct. 2733 (opinion of Justice Powell) (describing the importance of diversity in education as "substantial"); *see also Smith*, 233 F.3d at 1201 (reaffirming that Justice Powell's *Bakke* opinion states the law of this circuit). In addition, we cannot infer whether in the future PUSD may apply race as a factor in its admissions process for a purpose that is appropriately remedial. See *Croson*, 488 U.S. at 509-10, 109 S.Ct. 706 (discussing the basis for appropriately remedial use of race-based classifications under the Equal Protection Clause).

Our judicial review would "stand on a much surer footing in the context of a specific application" of the PUSD policy. *Toilet Goods*, 387 U.S. at 164, 87 S.Ct. 1520. Because Scott maintains that individual plaintiffs have applied and promise to continue to apply to PUSD voluntary schools despite the existence of the policy, and because an actual implementation of the challenged admissions criteria in the future will not ensure that the individual plaintiffs will not be admitted to the school of their choice, we find no hardship to Scott in declining to rule on the equal protection issue at this stage. As the Supreme Court stated when refusing to rule on the merits of Marco Defunis's moot discrimination claim, "if the

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composition, to PUSD's eligible student population during the 1999-2000 school year. As a result, we can draw no credible inference as to the conditions under which these criteria might be applied in the future.

admissions procedures of the [school] remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court." *DeFunis*, 416 U.S. at 319, 94 S.Ct. 1704. And, we expect that if a challenge to the PUSD policy returns to this court, it will do so under more appropriate circumstances.

C. *Supplemental Jurisdiction*

The district court asserted supplemental jurisdiction over Scott's state constitutional and statutory claims under 28 U.S.C. § 1367. However, with the dismissal of Scott's federal constitutional claim for lack of standing, we have no authority to retain jurisdiction over Scott's state law claims. 28 U.S.C. § 1367(a). By finding that Scott did not have standing to assert her federal equal protection claim, we have determined that the district court lacked subject matter jurisdiction. Thus, we have no discretion to retain supplemental jurisdiction over Scott's state law claims. *See Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 806 (9th Cir.2001) ("If the district court dismisses all federal claims on the merits, it has discretion under § 1367(c) to adjudicate the remaining claims; if the court dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims."); *see also Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1255 (6th Cir.1996) (stating that, after dismissal of plaintiff's federal claims for failure to state a claim under Rule 12(b)(1), "[e]xercise of jurisdiction . . . would[ ] violate Article III of the Constitution, because the original federal claim would not have 'substance sufficient to confer subject matter jurisdiction upon the court' ") (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

We therefore dissolve the district court's permanent injunction as improvidently granted, remand, and direct that this case be dismissed without prejudice.

IV. CONCLUSION

Because the plaintiffs lack standing to challenge the District's policy, we vacate the order of the district court and remand with instruction to dismiss the action without prejudice.

VACATED AND REMANDED WITH INSTRUCTION TO DISMISS WITHOUT PREJUDICE.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Feb. 7, 2000]

CASE NO. CV 99-1328 DT (MANx)

SYLVIA SCOTT, as Guardian *Ad Litem* for minors DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES and RONALD RUCKER; RENÉ AMY, as Guardian *ad Litem* for minors, CAMDEN RENE AMY and MARISSA LARAINE AMY; GEORGE FRANCIS and SYLVIA JIMENEZ MACPHERSON, as Guardian *ad Litem* for minor, GEORGE GORDON MACPHERSON; ROMEO ALVA, as Guardian *ad Litem* for minor, JOCELYNE ALVA,

Plaintiffs,

v.

PASADENA UNIFIED SCHOOL DISTRICT, GEORGE VAN ALSTINE; GEORGE PADILLA; JACQUELINE JACOBS; BONNIE ARMSTRONG; LISA FOWLER; VERA VIGNES; in their individual and official capacities, and JOSEPH WHITE ASSOCIATES,

Defendants.

I. BACKGROUND

A. Factual Summary

This action arises out of a policy enacted by the Pasadena Unified School District which purportedly establishes procedures for determining which children may attend certain schools within the school district on the basis of the children's race, color, national origin, ethnicity or gender.

This case is brought by Plaintiff, Sylvia Scott, as guardian ad litem for minors, Detrick Standmore, Kayla Hunter, Michaela Reyes, and Ronald Rucker; Plaintiff, René Amy, as guardian ad litem for minors, Camden René Amy and Marissa Laraine Amy; Plaintiffs George Francis MacPherson and Silvia Jimenez MacPherson, as guardians ad litem for minor, George Gordon MacPherson; Plaintiff Romeo Alva, as guardian ad litem for minor, Jocelyne Alva (collectively, "Plaintiffs") against Defendants Pasadena Unified School District ("PUSD"), George Van Alstine, George Padilla, Jacqueline Jacob's, Bonnie Armstrong, Lisa Fowler, and Vera Vignes (collectively, the "Individual Defendants"), and Joseph White Associates ("White") (PUSD and the Individual Defendants, collectively, "Defendants"). Plaintiffs' minors are students who attend schools within PUSD.

Plaintiffs and Defendants have filed Motions for Summary Judgment presently before this Court.

The following relevant facts are not reasonably in dispute [1]:

PUSD operates three voluntary schools: Don Benito Fundamental School; Norma Coombs Alternative School; and Marshall Fundamental School (collectively, the "Voluntary Schools"). *See* Declaration of Vera J. Vignes ("Vignes Decl."), ¶ 2.

Beginning with applications in the Spring of 1999 for the 1999-2000 school year, PUSD established a new procedure for admitting the entering class to Voluntary Schools. *See* Ex. A to the First Amended Complaint, Board Policy ("BP") 0460, p.4. If there are more applications than available places,

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[1] Both sides have made objections to certain evidence offered by the other. This Court will only address such objections as it becomes necessary to do so during the course of its analysis. Occasionally, the parties have objected to evidence which supports facts that the parties agree are not in dispute. When this has happened, the Court has overruled the objections and treated the facts as uncontroverted.

first consideration is given to siblings of students already enrolled in the school. *See. id.* If places are still available after siblings have been admitted, any remaining students are selected using a computerized lottery. *See id.*

Other than the three voluntary schools, no school in PUSD uses a lottery to admit students. *See* Vignes Decl., ¶ 3.

If a lottery is conducted, PUSD may, in certain circumstances, give consideration to one or more of several factors, including race, ethnicity and gender but only if necessary to create an integrated setting, because students with such characteristics were significantly under-represented in the application pool. *See* BP 0460(d) at ¶ 8.

On April 7, 1999, PUSD conducted lotteries for two of the Voluntary Schools—Don Benito and Norma Coombs. *See* Vignes Decl., ¶ 6. The third voluntary school, Marshall Fundamental, had seats available for, and admitted, all applicants. *See Id.*

Two of the Plaintiffs, Kayla Hunter and Michaela Reyes, applied and were admitted to Marshall Fundamental for the 1999-2000 school year. *See id.*; *see also* Vignes Second Decl., ¶ 2.

Three of the eight student Plaintiffs, Jocelyne Alva, Detrick Standmore and Ronald Rucker, did not apply to any of the PUSD voluntary schools for the 1999-2000 school year. *See* Vignes Decl., ¶ 5; *see also* Vignes Second Decl., ¶ 1.

Two of the Plaintiff students, Camden Rene Amy and Marissa Laraine Amy, applied to Norma Coombs. *See* Motion for Summary Judgment, Ex. 6 (Letter of Mr. Rene Amy to PUSD Superintendent Vignes).

Plaintiff George MacPherson applied to Don Benito for 1999-2000, was included in the random lottery for Don Benito that was held on April. 7, 1999, and was not selected. *See* MacPherson Decl., ¶¶ 4-5, 7.

II. Procedural Summary

On February 4, 1999, Plaintiffs filed a Complaint in this Court for Declaratory Relief and Injunctive Relief From Policies and Practices of Defendants.

On February 4, 1999, George Francis MacPherson and Silvia Jimenez MacPherson filed a petition and order for Appointment of Guardian ad Litem as the parents of George Gordon MacPherson, minor. On February 4, 1999, René Amy filed a petition and order for Appointment of Guardian ad Litem as the parent of Camden René Amy and Marissa Laraine Amy, minors. On February 4, 1999, Romeo Alva filed a petition and order for Appointment of Guardian ad Litem as the parents of Jocelyne Alva, minor. On February 4, 1999, Sylvia Scott filed a petition and order for Appointment of Guardian ad Litem as the foster parent of Detrick Standmore, Kayla Hunter, Michaela Reyes, and Ronald Rucker, minors.

On March 29, 1999, Plaintiffs filed a First Amended Complaint alleging the following counts [2]:

(1) Count 1 (as to all Defendants—general allegations of conduct).

(2) Count 2 (as to all Defendants—violation of 42 U.S.C. § 1985).

(3) Count 3 (as to Individual Defendants—deprivation of the privileges to a public education secured by the U.S. and California Constitutions).

(4) Count 4 (as to Individual Defendants—deprivation of the equal protection of the laws pursuant to the 14th Amendment of the U.S. Constitution and Article I, § 7, of the. California Constitution).

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[2] The face of the First Amended Complaint fails to specifically label the claim asserted in each "count."

(5) Count 5 (as to Individual Defendants—violation of Article I, § 31 of the California Constitution).

(6) Count 6 (as to Individual Defendants—violation of the equal protection provisions of the 5th and 14th Amendments to the United States Constitution, and Article I, §7, of the California Constitution).

(7) Count 7 (as to Individual Defendants—violation of the privileges and immunities clauses of the 14th Amendment to the United States Constitution, and Article I, § 7 of the California Constitution).

(8) Count 8 (as to Individual Defendants—violation of the California Code of Civil Procedure § 526a).

(9) Count 9 (as to Individual Defendants—violation of Article I, § 8 of the California Constitution).

(10) Count 10 (as to Individual Defendants—violation of 42 U.S.C. § 1983).

(11) Count 11 (as to Individual Defendants and White—violation of California Civil Code § 51).

(12) Count 12 (as to PUSD and Individual Defendants—violation of 42 U.S.C. § 2000d).

On April 19, 1999, Defendants filed a Motion to Dismiss Complaint. On April 23, 1999, Defendants filed a Corrected Motion to Dismiss Complaint.

On June 17, 1999, Plaintiffs filed a Notice of Voluntary Dismissal of Defendant, White, without prejudice.

On June 28, 1999, this Court filed an Order Denying Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint.

On July 8, 1999, Defendants filed an Answer to Plaintiff's First Amended Complaint.

On September 7, 1999, this Court held a Mandatory Status Conference, where it set the Discovery Cut-Off date of February 18, 2000, and the Pre-Trial Conference for April 17, 2000.

On December 7, 1999, Defendants filed the Motion for Summary Judgment presently before this Court.

On January 10, 2000, this Court issued an Order Granting Defendants' Ex Parte Application to Continue the Hearing for Defendants' Motion for Summary Judgment. Accordingly, this Court continued the hearing date on Defendants' Motion for Summary Judgment from January 18, 2000, to February 7, 2000.

On January 14, 2000, Plaintiffs filed a Motion for Summary Judgment, which is also before this Court.

I. DISCUSSION

A. Standard: Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *See id.*; Fed R. Civ. P. 56(e). It may not rely on "mere allegations or denials of the adverse party's pleadings." Fed. R. Civ. P. 56(e).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *See Celotex Corp. v. Catrett.*, 477 U.S. 317, 322 (1986) . Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *See Anderson,* 477 U.S. at 250-51. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See Harper v. Wallingform,* 877 F.2d 728 (9th Cir. 1989); *California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied,* 484 U.S. 1006 (1988).

If the moving party seeks summary judgment on a claim or defense on which it bears the burden of proof at trial, it must satisfy its burden by showing affirmative, admissible evidence.

Unauthenticated documents cannot be considered on a motion for summary judgment. *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

On a motion for summary judgment, admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. Fed. R. Civ. P. 56(e). Declarations on "information and belief" are inappropriate to demonstrate a genuine issue of fact. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) .

B. Analysis

1. Defendants' Motion for Summary Judgment Based on Plaintiffs' Lack of Standing Denied.

Defendants contend that summary judgment in their favor is warranted on the ground that Plaintiffs have not suffered the requisite "injury in fact" to support Article III Standing. This Court disagrees.

The judicial power of this Court is limited by Article III of the Constitution and "is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). To ensure that a federal court's Article III power has been properly invoked, the courts have developed the doctrine of standing to address the question of "whether the litigant is entitled to have the court decide the merits of the dispute." *Lee v State of Oregon*, 107 F. 3d 1382, 1387 (9th Cir. 1997). "The core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lugan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) .

The burden to show standing is on the party invoking federal jurisdiction, in this case Plaintiffs, who must demonstrate that they are proper parties to bring the claims asserted. *See FW/PBS Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976) ; *Warth v. Seldin,* 422 U.S. 490 (1975). To have standing, Plaintiffs must demonstrate three elements. First, Plaintiffs must have suffered an "injury in fact," which is a "(a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical'" injury. *Lujan*, 504 U.S. at 560. Second, there must be a causal relationship between the injury and the challenged conduct which is "fairly . . . trace[able] to the challenged action of the

defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.* (quoting *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 41-42 (1976)). Third, there must be a likelihood that the injury will be redressed by a favorable decision. *Id.* (quoting *Allen v. Wright,* 468 U.S. 737, 750 (1984)).

The only element of Plaintiffs' standing which is at issue here is that of injury in fact. It cannot be reasonably disputed that if Plaintiffs have suffered an injury, it has been caused by PUSD BP 0460 and that a judicial decree directing the PUSD to discontinue BP 0460 would "redress" the injury.

Defendants argue that since the PUSD assigned students to the voluntary schools in a race-neutral manner last year, those Plaintiffs which did apply to the Voluntary Schools for which a lottery was conducted did not suffer discrimination in school assignments for the 1999-2000 school year and thus do not have standing. The Defendant also notes that some of the students did not even apply to the schools for which lotteries were conducted and thus could not have suffered any sort of injury. This Court disagrees.

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.

Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1982).

Therefore, whether or not Plaintiffs actually suffered racial discrimination is immaterial. Rather, "[t]o establish standing

[Plaintiffs] need only demonstrate that [they are] able and ready [to apply to the Voluntary Schools] and that a discriminatory policy prevents [Plaintiffs] from doing so on an equal basis." *Id.* Based on the Supreme Court's rationale in *Northeastern Florida,* any Plaintiff who applied to or is now ready and able to apply to the Voluntary Schools, has standing to bring this action regardless of whether or not that Plaintiff was ultimately admitted to the schools to which he or she applied.

Here, it is undisputed that several of the minor Plaintiffs did in fact apply to the Voluntary Schools for the 1999-2000 school year. Specifically, two of the Plaintiffs, Kayla Hunter and Michaela Reyes, applied to Marshall. Plaintiff George MacPherson, applied to Don Benito. As for Plaintiffs Camden Rene Amy and Marissa Laraine Amy, it is irrelevant that there is a genuine issue of fact as to whether their applications to Norma Coombs were ultimately processed and subjected to the lottery for that school).[3] Nevertheless, the fact that the Amy's did submit applications is sufficient to demonstrate that they were at least ready and able to apply to Norma Coombs and thus be subjected to a lottery governed by Paragraph 8 of BP 0460(d). Since these five students either applied to the schools subject to the lottery procedures governed by Paragraph 8 of BP 0460(d) or are undisputably ready and able to do so, it cannot reasonably be disputed, in light of *Northeastern Florida,* that these five Plaintiffs have standing to challenge the Policy.

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[3] Mr. Amy stated that he wanted his children to attend Norma Coombs in the event that another school, Woodrow Wilson Middle School, did not end up offering an International Baccalaureate Program for the 1999-2000 school year. *See* Defendants' Opp., Ex. 6. Woodrow Wilson ultimately decided to offer such a program after the applications to attend Norma Coombs were due. Mr. Amy contends that his children's applications to Norma Coombs were processed and denied. Defendants state that their applications were considered inoperative because they had already been assigned to Woodrow Wilson per Mr. Amy's request.

Three other student Plaintiffs, Jocelyne Alva, Detrick Standmore and Ronald Rucker, differ from the other five because none of them applied to any of the PUSD voluntary schools for the 1999-2000 school year. Defendants argue that based on their current grade levels, these three Plaintiffs will not be eligible for Marshall until 2001-2002, 2003-2004, and 2005-2006, respectively. The Supreme Court has stated that a plaintiff seeking injunctive relief must show a likelihood that he or she will be injured in the future. *See City of Los Angeles v. Lyons* 461 U.S. 95, 103 S.Ct. 1660, 75 L.ED.2d 675 (1983). The Declaration of Sylvia Scott, the guardian ad litem for Plaintiffs Detrick Standmore and Ronald Rucker, indicates that she intends to submit applications to the appropriate voluntary schools for these children in the future. *See Scott Decl.*, ¶¶ 7-8 [4]. Romeo Alva, guardian ad litem for Plaintiff Jocelyne Alva, states that he intends to do the same in the future as well. *See* Alva Decl., ¶ 5. Such declarations are sufficient to demonstrate to this Court that these minor Plaintiffs are ready and able to apply to the voluntary schools. And, given the fact that neither Defendants or the language of BP 0460 indicate a date past which it will no longer give "consideration" to the racial, ethnic or gender composition of the applicant pool to the Voluntary Schools, this Court finds that the likelihood of injury required by the *Lyons* Court exists. Accordingly, Plaintiffs Detrick Standmore, Ronald Rucker and Jocelyne Alva have standing before this Court to press their claims.

Since this Court has determined that all of the minor have standing since they are ready and able to apply to at least one of the three voluntary schools in question, the next step in its

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[4] The Court overrules Defendants' objections as to these paragraphs of Scott's Declaration for being vague and speculative. In light of *Northeastern Florida, these* statements are specific enough for the purposes for which they are offered: to demonstrate that Ms. Scott is ready and able to apply to the Voluntary Schools.

inquiry is to determine whether BP 0460(d), ¶ 8, is a discriminatory policy which prevents these Plaintiffs from applying to the voluntary schools on an equal basis with other applicants.

The language of BP 0460(d), ¶ 8, renders untenable Defendants' position that places were assigned in a race-, ethnic-, or gender-neutral manner. The undisputed language of Paragraph 8 of BP 0460 states, in pertinent part, that "[i]f a lottery is conducted, PUSD may, in certain circumstances, give consideration to one or more of several factors, including gender, race or ethnicity. . . ." BP 0460(d), ¶ 8. Based on the face of such language, it cannot be disputed that PUSD uses racial and gender classifications to effect the chances of some students being selected in the lottery, even if only in circumstances where it is "necessary to create an integrated setting, because students with such characteristics were significantly under-represented in the application pool." BP 0460(d), ¶ 8. How can the lotteries be run in a truly race-or gender-neutral manner if Defendants are always keeping an eye on the applicant pool to make sure it is a fair representation of the PUSD's racial, ethnic or gender make-up as a whole? It is logically impossible to do so, even if such monitoring is done by a computer program instead of individuals. The language of Paragraph 8 of BP 0460(d) leads this Court to conclude that Plaintiffs may not compete on equal ground with other students for *all*, of the seats at the three schools in question. As a result, all Plaintiffs have satisfied both aspects of the injury in fact requirement for standing with respect to equal protection claims as established by the Supreme Court in *Northeastern Florida.*

Based on the foregoing, this Court hereby denies Defendants' Motion for Summary Judgment for lack of standing.

2. The Constitutionality of BP 0460

The parties do not dispute that, based on the content of BP 0460(d), ¶ 8, "[i] f a lottery is conducted, PUSD may, in certain circumstances, give consideration to one or more of several factors, including gender, race or ethnicity . . . ."(hereafter, the "Policy").

a. The Policy's Racial and Ethnic Classifications

"[A] ll racial classifications, imposed by whatever federal, state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors Inc. v. Pena,* 515 U.S. 200, 227, 115 S.Ct. 2097, 2113, 132 L.Ed.2d 158 (1995). To be constitutional, such classifications must be "narrowly tailored measures that further compelling governmental interests." *Id.*

Defendants argue that summary judgment in favor of Plaintiffs as to their Equal Protection claims is inappropriate at this time because Plaintiffs have not met their burden of demonstrating that the Policy is not narrowly tailored to a compelling state interest. Defendants are correct to the extent that Plaintiffs bear the burden of proving that racial and ethnic classifications exist. However, where, as here, it cannot reasonably disputed that the Policy contains such classifications on its face, the burden of proving the racial and ethnic classifications meet strict scrutiny then shifts to the *government. See Miller v, Johnson*, 515 U.S. 900, 920, 115 S.Ct. 2475, 2490, 132 L. Ed.2d 762 (1995).

As this Court stated earlier, a non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Perhaps as a result of their erroneous belief as to which party holds the

burden of proof on this issue, Defendants generally fail to even attempt to create a triable issue of fact with respect to whether the Policy's racial or ethnic classifications survive strict scrutiny. Defendants have not offered any purpose for the racial and ethnic classification of the Policy. Therefore, this Court is only left to look at the undisputed language of the Policy to glean which purpose, if any, the language seeks to serve. This Court has found two possible goals of the race- and ethnic-based lottery systems—a broad goal and a narrower one.

The broad goal which the PUSD presumably intends BP 0460 to work towards "is to improve all students' understanding and appreciation of their own backgrounds while, at the same time, exposing them to the many other cultural heritages and varied life experiences of Pasadena, Altadena and Sierra Madre communities in a positive way . . . . through education in a thoroughly integrated setting." BP 0460, p.1. In other words, BP 0460 is ultimately designed to promote diversity. Whether diversity is a compelling state interest remains unresolved and this Court will not resolve it here . *But see Hopwood v . Texas.*, 78 F.3d 932, 944 (5th Cir. 1996) , *reh'g en banc denied,* 84 F.3d 720 (5th Cir. 1986), *cert.* denied, 518 U.S. 1033, 116 S.Ct. 2581, 135 L.Ed.2 d 1095 (1996) (holding that "consideration of race or ethnicity by the [University of Texas] law school for the purposes of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."). Nevertheless, this Court will assume, without holding, that diversity may be a compelling government interest and proceed later to examine whether the policy is narrowly tailored to achieve diversity. *See Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 130 (4th Cir. 1999).

The narrow goal of the use of racial and ethnic classifications in the lottery procedure for Voluntary Schools is to prevent segregation in the event the applicant pool for a

voluntary School is not representative of the racial or ethnic make-up of the school district as a whole. Since this is the only circumstance in which such factors are ultimately considered.

In this respect, the case at bar is analogous to that of *Missouri v. Jenkins*, 515 U.S. 70, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995), where the Supreme Court concluded that the Constitution only requires a school district provide equal *opportunity*, not equal *results*. Therefore, so long as all students have the equal opportunity to submit their names to a truly random lottery (i.e., one that is blind as to the applicants' race and ethnicity), the PUSD has met its constitutional obligations. By constructing a mechanism through which it can control or even influence the results of the lottery to reflect the overall racial and ethnic composition of the school district, the PUSD has moved beyond its obligations to provide equal opportunity to its students and to the point of trying to guarantee equal results.

Interestingly enough, the Supreme Court addressed the Puss's propensity to use racial and ethnic classifications in the non-remedial assignment of pupils in *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 434-3696 S.Ct. 2697, 49 L.Ed.2d 599 (1976). "The Supreme Court . . . emphasized that when a large percentage of minority students results from housing patterns for which school authorities are not responsible, the school board may not be charged with unconstitutional discrimination if a racially neutral assignment method is adopted." *Spangler v. Pasadena City Bd. of Ed.*, 611 F.2d 1239 (9th Cir. 1979). Applied to the facts at bar, the Supreme Court's rationale makes it clear that if racial or ethnic imbalance occurs in some PUSD schools because students are permitted to apply to and transfer to a Voluntary School, such imbalance "is a product of 'private choices [and] it does not have constitutional implications.'" *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123,

132 (4th Cir. 1999) (quoting *Freeman v. Pitts*, 503 US. 467, 495, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992)). Thus Defendants cannot justify their use of racial and ethnic classifications in selecting the student bodies of the Voluntary Schools in order to maintain diversity at these schools.

Even assuming that achieving diversity is a compelling state interest, Defendants have not submitted any evidence or arguments to support a conclusion that a triable issue of fact remains with respect to whether the Policy's racial and ethnic classification are narrowly tailored to meet that purpose. Specifically, Defendants have not addressed the following factors which a court must consider when reviewing whether a state racial classification is narrowly tailored: "(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties." Unit *States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987) . Since Defendants have failed to address these factors, this Court is left to consider them only in light of the undisputed facts before it.

First, the court must consider whether there are alternative race-neutral policies to achieving racial and ethnic diversity through the maintenance of certain racial and ethnic balances among the student bodies at the voluntary schools. It is logically impossible to construct a race-neutral way of accomplishing racial balancing. If such a method exists, Defendants have not brought it to the Court's attention.

Second, this Court must determine the planned duration of the policy. BP 0460 is slated to begin in the 1999-2000 school year but does not indicate when, if ever, the use of racial or ethnic classification will cease. BP 0460 only states that the

PUSD Board "shall be reviewed annually by no later than June of each year." BP 0460, p.5. Since a racial classification cannot continue in perpetuity but must have a "logical stopping point," the Policy is not narrowly tailored. *City of Richmond v Croson*, 488 U.S. 469, 498, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

Third, the Court must take into account the relationship between the numerical goal and the percentage of minority group members in the relevant population. The means employed by the Policy to achieve racial and ethnic diversity is essentially racial balancing. Defendants argue that the Policy is race-neutral because it does not specifically set aside a percentage of spots for applicants meeting certain racial and ethnic criteria. However, by weighting the lottery for certain applicants when the applicant pool does not reflect the racial and ethnic make-up of the PUSD's student population as a whole, the lottery can, practically speaking, have the same result as a numerical set aside.

Fourth, this Court must consider the flexibility of the Policy. Notably, the language of the Policy does not include a provision for waivers in the event that the racial and ethnic composition of the applicant pool does not reflect that of the PUSD student population as a whole and thus, no matter how much weight is given to certain students based on their race or ethnicity, racial and ethnic diversity still may not be achieved.

Fifth, the Court must examine the burden of the policy on innocent third parties. In this case, the innocent third parties who are hurt by BP 0460's preferential lottery procedures are young elementary school -students who, by absolutely no fault of their own, are part of a racial or ethnic group who makes up a larger part of the applicant pool to the voluntary schools than they do the school district as a whole. As the Fourth Circuit recently stated in *Tuttle v. Arlington County School Bd.*, 195 F.3d 698, 707 (4th Cir. 1999), it is "ironic

that a Policy that {presumably} seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups."

Based on the foregoing analysis of the five factors used to evaluate whether a racial or ethnic classification is narrowly tailored, it is clear that the Policy is not narrowly tailored.

The cases on which Defendants rely to demonstrate that a public school may consider race and ethnicity are easily distinguishable from the case at bar. For example, Defendants are correct that in *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999), *petition for reh'g pending,* the Ninth Circuit permitted the University of California at Los Angeles to consider such factors in the admission of students to an elementary school operated by UCLA's Graduate School of Education and Information Studies. However, in *Hunter*, the school at issue was essentially an island unto itself; it was operated as a research laboratory by UCLA "to help the State of California meet the needs of a dramatically changing public school population." *Hunter*, 190 F.3d at 1062. The Ninth Circuit found that this purpose was indeed a compelling state interest and concluded that the school's discriminatory admission policy meets strict scrutiny. The Voluntary Schools are clearly distinguishable from the school at issue in *Hunter* because they are run by a large school district to meet the needs of a large community, not to meet the narrowly tailored research needs of a public university.

Ho v. San Francisco Unified School District, 147 F.3d 854, is also distinguishable from the case at bar. There, the Ninth Circuit upheld a trial court's decision to deny the plaintiff's motion for summary judgment and remanded the case for trial because a triable issue remained as to whether the racial classification at issue was still necessary to remedy past discrimination. Here, Defendants have not asserted that the

Policy at issue is designed to remedy past discrimination, much less created a triable issue of fact on this or any other point for which it bears the burden of proof.

Based on the foregoing, Defendants have clearly failed to meet their burden of proving a genuine triable issue of fact exists as to whether the Policy's racial and ethnic classifications are narrowly tailored to meet a compelling state interest. Accordingly, this Court hereby grants Plaintiffs' Motion for Summary Judgment as to all of its causes of action as they relate to the Policy's use of racial and ethnic classifications.

b. The Policy's Gender Classification

Next, this Court must address the constitutionality of the Policy's gender classification. When a gender classification exists, a court must apply so-called intermediate scrutiny to determine whether the classification is constitutional. The gender classification "must serve important governmental objectives and must be substantially related to those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976) .

Here, Defendants fail to even address the relevant level of scrutiny for gender classifications, much less argue whether Plaintiffs or Defendants bear the burden of proof. Presumably, Defendants would have this Court require that Plaintiffs bear the burden of proving that the gender classification of the Policy does not meet the appropriate level of scrutiny just as it would with respect to the Policy's racial or ethnic classifications. Once again, however, Defendants would be wrong for they, not Plaintiffs, bear the burden of proof. *See United States v. Virginia*, 518 U.S. 515, 531, 116 S.Ct. 2264, 2274, 135 L.Ed.2d 735 (1996) (stating that the party seeking "to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action" (internal quotation omitted)).

Defendants are once again reminded that a non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. *See Celotex Corp v. Catrett,* 477 U.S. 317, 322 (1986). Defendants have not met their burden because they have not presented any arguments which address whether the gender classification meets intermediate scrutiny. Therefore, summary judgment in favor of Plaintiffs would be merited on this basis alone.

Nevertheless, the Supreme Court's decisions in *Jenkins, Spangler* and *Freeman* lead this Court to conclude that the PUSD's use of gender classifications in the Policy goes impermissibly beyond the scope of the government's constitutional obligation to provide equal *opportunities*, not equal *results*, for both genders. As this Court noted above with regard to racial imbalances among voluntary schools, when such imbalances are the product of private choices they do not have constitutional implications.

Based on the foregoing, Defendants have clearly failed to meet their burden of proving that a triable issue of fact exists as to whether the Policy's gender classification is substantially related to an important government interest. Accordingly, this Court hereby grants Plaintiffs' Motion for Summary Judgment as to the Policy's gender classification.

c. Article 1, Section 31 of the California Constitution

Plaintiffs also move for summary judgment based on CAL. CONST. ART. I, § 31 (a) , which provides, in pertinent part, that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in operation of . . . public education . . . ."

Defendants argue that subsection (e) of that section of the California Constitution applies to DP 0460. This Court disagrees.

CAL. CONST. ART. I, § 31(e) provides that this section of the California Constitution does not apply to actions that must be taken to establish or maintain eligibility and avoid loss of funds for federal programs. Defendants contend that if this Court invalidates BP 0460, the PUSD risks losing federal funding if it "subject's] an individual to segregation or separate treatment," 34 C.F.R. S 100.3(b) (1) (iii), or "utilizes criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 34 C.F.R. § 100.3(b) (2).

If anything, BP 0460's lottery procedures for the Voluntary Schools may violate 34 C.F.R. § 100.3(b) (1) (iii) because they subject individuals to separate treatment on the basis of their race. As a result, this Court finds that BP 0460 'does not fall within the scope of CAL. CONST. ART. I, § 31(e). Accordingly, BP 0460 is unconstitutional under CAL. CONST. ART. I, § 31(a) as well as the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

III. CONCLUSION

Based on the foregoing discussion, this Court DENIES Defendant's Motion for Summary Judgment.

In addition, this Court GRANTS Plaintiffs' Motion for Summary Judgment as to all of its causes of action. The racial and ethnic classifications embodied in BP 0460 do not serve a compelling government purpose nor are they narrowly tailored. In addition, Defendants have failed to create a triable issue of fact as to whether BP 0460's gender classification is substantially related to an important government interest.

In order to bring BP 0460 into compliance with the Constitution, this Court hereby ORDERS Defendants to cease giving *any "consideration" of any sort* to the race, ethnicity or gender of applicants to the lottery for the voluntary schools under *any circumstances.* Any references to race, ethnicity or gender in BP 0460 (d), ¶ 8 are hereby ordered null and void. Defendants shall strike such references from the Policy and cease from considering such factors in all future lotteries conducted to assign students to voluntary Schools in the PUSD. A permanent injunction to that effect is hereby issued.

Lastly, this Court would like to note that the Pasadena Unified School District need not and should not resort to using race-, ethnic-, or gender-based preferences to provide all the children of the PUSD with a quality education. To prove this point, this Court hereby takes judicial notice, pursuant to Fed. R. Evid. 201, of the most recent Academic Performance Index (API) released by the State of California's Department of Education.

The API rankings are in deciles with 10 being the highest and 1 the lowest. Each decile contains 10% of all schools. All four of the schools in the San Marino Unified School District received a 10, meaning that they ranked in the top 10% statewide. Likewise, all four schools in the La Canada Unified School District received a 10 as well. Four of the five schools in the South Pasadena Unified School District's also received a 10; the fifth received a 9.

Compared to these neighboring school districts, the PUSD's schools performed abysmally. Of the 27 schools the PUSD runs, only one, Don Benito, received a 10. No schools received a 9 or 8. Only one school, Allendale Elementary, received a 7. Three schools received a 6, six schools received a 5, six schools received a 4, seven received a 3, and three schools, including Muir High, received a 2. The PUSD should be utterly and completely ashamed of its apparent inability to

provide its students with the same level and quality of instruction as its immediate adjoining and neighboring school districts.

In summary, the PUSD should concentrate its efforts toward providing a quality education to all of its students by furnishing qualified teachers, adequate support staff, necessary resources, clean facilities and a safe learning environment. A policy of open enrollment with equal opportunity for all students should be the goal. All vestiges of favoritism, racism and prejudice in any form or disguise should be completely eliminated, including the procedure employed here. The community of Pasadena has entrusted the PUSD to educate all of its students at the highest level of excellence without regard to race, gender, ethnicity or any other classification. Well meaning and well intended social policies that continue to classify students on the basis of race, gender and ethnicity perpetuate rather than eliminate class conflict and undermine the concept of "all men and women are created equal."

IT IS SO ORDERED.

DICKRAN TEVRIZAN
Dickran Tevrizian, Judge
United States District Court

Dated: 2-7-00

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Feb. 23, 2000]

Case No. CV 99-1328 DT (MANx)

SYLVIA SCOTT, as guardian ad litem for minors, DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES, and RONALD RUCKER; RENÉ AMY, as guardian ad litem for minors, CAMDEN RENÉ AMY and MARISSA LARAINE AMY, GEORGE FRANCIS AND SILVIA JIMENEZ MACPHERSON, as guardian ad litem for minor, GEORGE GORDON MACPHERSON; ROMEO ALVA, as guardian as litem for minor, JOCELYNE ALVA,

Plaintiffs,

v.

PASADENA UNIFIED SCHOOL DISTRICT; GEORGE VAN ALSTINE; GEORGE PADILLA; JACQUELINE JACOBS; BONNIE ARMSRTRONG; LISA FOWLER; VERA VIGNES; in their individual and official capacities, and JOSEPH WHITE ASSOCIATES,

Defendants.

FINDING OF FACTS AND CONCLUSIONS OF LAW

The above-entitled cause on motions for summary judgment was submitted to the Court, and the Court having considered the evidence now finds the following:

FINDINGS OF FACT

1. All Plaintiffs are students within the Pasadena Unified School District (hereafter referred to as "PUSD").

2. All Plaintiffs have either applied to PUSD voluntary schools or will apply,

3. Defendants GEORGE VAN ALSTINE, GEORGE PADILLA, JACQUELINE JACOBS, BONNIE ARMSTRONG, and LISA FOINLER are, and have been, at all times relevant, members of the PUSD governing board.

4. Defendant VERA VIGNES is the Superintendent of PUSD.

5. Defendant JOSEPH WHITE and ASSOCIATES (hereafter referred to as "WHITE") is a business entity.

6. Defendant PUSD is a unified school district as defined under Education Code § 83 and established pursuant to Article IX, § 6, of the California Constitution.

7. PUSD operates three voluntary schools: Don Benito Fundamental School; Norma Coombs Alternative School; and Marshall Fundamental School.

8. PUSD enacted Board Policy (hereafter referred to as "BP") 0460.

9. BP 0460(c)3 says:

> *At sites where the number of students of any major ethnic group varies from the percentage of such students in the overall district student population by +/-20%, no additional permits or transfers from this group may be granted into these sites.*

10. BP 0460(c)7 provides:

> *Beginning in the 1999-2000 school year, the Board of Education shall establish a lottery for voluntary or magnet schools that offer a unique curriculum where there are more applicants than seats available. In assigning students to a voluntary or magnet school, the lottery process shall utilize the parameters set forth in this policy to promote an integrated school setting.*

11. BP 0460(c)3 says:

> *The district shall recruit a diverse applicant pool, monitor the applicant pool, and target recruiting as appropriate. First consideration will also be given to the fact that some applicants may have siblings attending a voluntary or magnet school. When necessary to create an integrated setting, consideration will be given during the student assignment process to several factors, including gender, race, or ethnicity, socio-economic status, language and special education needs.*

12. BP 0460(d)l (under the subtitle *Monitoring and Evaluation)* provides:

> *In October of each year, the Director of Student Support Services in coordination with the Director of Research and Evaluation shall submit a report to the Superintendent providing the data regarding the gender, racial-ethnic, and socio-economic composition of the applicant pool for all voluntary schools. The number of students with extraordinary and/or special needs and whose second language is English shall also be included. The Superintendent will evaluate this data to identify under represented groups in the applicant pool in order to determine whether information regarding the special programs, academies, magnet or voluntary schools is available to all groups. The Superintendent will also evaluate whether obstacles exist that impede diversity profiles of each school. The Superintendent will then recommend strategies to address identified red obstacles to access.*

13. BP 0460(e)2 provides:

> *The Board of Education shall be informed by the Superintendent in October of each school year of the diversity profiles of each school. There profiles shall include the mix of male and female students, socio-*

economic levels, students who speak English as a second language, and exceptional abilities and/or special needs of the district 's schools and programs.

14. BP 0460 has no termination date.

15. BP 0460 does not provide for waivers allowing a child or the child's parents to opt out of its racial and gender requirements.

16. PUSD reserves to itself the option of using race, ethnicity, or gender in the future in assigning seats at the voluntary schools.

17. PUSD gave Plaintiffs/applicants to the voluntary schools no written or oral notice that said applicants would not be subject to the racial balancing described in BP 0460 during the last lottery procedure, i.e., 1999/2000 school year.

18. On April 7, 1999, PUSD conducted lotteries for two of the voluntary schools—Don Benito Fundamental School and Norma Coombs.

19. The third voluntary school, Marshall Fundamental, had seats available for, and admitted, all applicants.

20. During the 1999-2000 school year, Kayla Hunter and Michaela Reyes applied to Marshall Fundamental School, George MacPherson applied to Don Benito Fundamental School, and, Camden and Marissa Amy applied to Norma Coombs Alternative School.

21. Other than the three voluntary schools, no schools in PUSD use a lottery to admit students.

22. PUSD assigned students to the voluntary schools in a race-neutral manner for the 1999/2000 school year.

23. All plaintiffs are ready, willing, and able to apply to the voluntary schools.

24. The application for the voluntary schools requires applicants to identify their ethnicity, race and gender.

25. Under BP 0460, the racial and ethnic makeup at any voluntary school has to reflect, within a certain percentage, the racial and ethnic makeup of the district as a whole. Children would not be admitted to such schools unless their race and ethnicity fit within the pattern required by the policy.

26. PUSD uses racial and gender classifications to effect the chances of some students being selected in the lottery when the school district deems it necessary to create an integrated setting.

27. Plaintiffs may not compete on an equal basis with other students for all of the seats at the voluntary schools.

28. PUSD's Governing Board entered into a written agreement with WHITE, pursuant to which PUSD paid WHITE Ten Thousand Dollars ($10,000.00), for which WHITE provided computer software to implement a lottery system for admitting students into the voluntary schools. The computer software was specifically designed so that applicants are accepted or rejected for enrollment in the three above-described schools based upon race, color, national origin, ethnicity, and gender.

29. The brochure provided to Defendants and parents by WHITE said, among other things, that "an individual student is selected at random from the pool of applicants and is considered for her or his effect on the ethnic balance . . . ."

30. Plaintiffs, and each of them, reside within the jurisdiction of PUSD and have been assessed for, and are liable to pay, or, within one (1) year of the commencement of this action, have paid, a tax, which is for the benefit and support of PUSD.

31. Taxpayer money has been spent on the activities in enforcing and implementing BP 0460 by the Defendants.

32. Marshall Fundamental Secondary School has a Computer Careers Academy which is designed to provide students with an opportunity to study courses in pursuit of a career in computer technology.

33. The application for the voluntary schools for school year 1999/2000 requires applicants to identify their race.

34. The application for the voluntary schools for school year 2000/2001 requires applicants to identify their race.

35. BP 0460 is not designed to remedy past discrimination.

36. PUSD is a large school district which is established to meet the needs of a large community and is not operated as a research laboratory.

CONCLUSIONS OF LAW

From the facts the Court concludes:

1. All Plaintiffs have standing for each cause of action alleged in the First Amended Complaint.

2. All Plaintiffs have sustained injuries under each cause of action in the First Amended Complaint.

3. Defendants do not have a compelling state interest in using racial classifications.

4. There is a likelihood that plaintiffs will be injured in the future.

5. Whether diversity is a compelling state interest remains unresolved. Assuming, without holding, that diversity is a compelling governmental interest, BP 0460 is not narrowly tailored.

6. BP 0460 does not provide a race-neutral manner to accomplish racial balancing and is thus not narrowly tailored.

7. BP 0460 does not indicate when, if ever, the use of racial or ethnic classifications will cease, and is thus not narrowly tailored.

8. BP 0460 weights the lottery for certain applicants when the applicant pool does not reflect the racial and ethnic make-up of the PUSD student population as a whole, thus having the same result as a numerical set aside. As such, BP 0460 is not narrowly tailored.

9. BP 0460 does not include a provision for waivers and is thus not narrowly tailored.

10. The burden of BP 0460 falls on children who, through no fault of their own, are part of a racial or ethnic group which makes up a larger part of the applicant pool to the voluntary schools than they do the school district as a whole. As such, BP 0460 is not narrowly tailored.

11. PUSD is a large school district which is established to meet the needs of a large community and is thus does not meet the narrowly tailored needs of a research laboratory.

12. BP 0460's gender classification does not serve important governmental objectives.

13. BP 0460 is unconstitutional on its face as it conditions admission to schools on race, ethnicity, and gender, and thus violates the Fourteenth Amendment to the United States Constitution.

14. BP 0460 gives preferential treatment according to race, gender, and ethnicity, and therefore violates California Constitution, Article I, § 31.

15. BP 0464 imposes burdens on the Plaintiffs because of their race, and therefore violates California Constitution, Article 1, § 31.

16. By entering into the contract with WHITE for computer software, furthering and implementing the racial and gender based admissions policy of BP 4460, Defendants, and each of them, have conspired to directly or indirectly deprive Plaintiffs of the equal protection of the laws, and of equal privileges and immunities under the laws.

17. By entering into the contract with WHITE, Defendants, and each of them, have conspired to deprive Plaintiffs of having and exercising a right or privilege of a citizen of the United States on account of their race, color, national origin, ethnicity, or gender in violation of 42 U.S.C. 1985.

18. The actions of Defendants were under color of law with the purpose of discrimination against Plaintiffs, as well as other applicants, solely because of the uncontrolled circumstance of race, color, national origin, ethnicity, or gender.

19. Defendants VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES deprived Plaintiff's of the privileges to a public education secured by the U.S. and California Constitutions.

20. BP 0460 deprives Plaintiffs of the equal protection of the laws pursuant to the Fourteenth Amendment of the U.S. Constitution and Article I, § 7, of the California Constitution.

21. Defendants VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, and each of them, by granting preferential treatment to, and/or discriminating against, potential students for placement in schools based upon race, color, national origin, ethnicity, or gender, through use of the lottery or other means, have unlawfully violated the equal protection provisions of the

Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 7, of the California Constitution, to the detriment and injury of the Plaintiffs.

22. Defendants PUSD, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, and each of them, by granting preferential treatment to, and/or discriminating against, potential students for placement in schools based upon race, color, national origin, ethnicity, or gender, through use of the lottery or other means, have unlawfully violated the privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution to the detriment and injury of the Plaintiffs.

23. The expenditure of taxpayer funds for the Defendants' acts is an illegal expenditure of, waste of, or injury to the estate, funds, or other property of, PUSD.

24. The acts of Defendants VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES were done under color of law and subject Plaintiffs to a deprivation of their rights to attend public schools regardless of their race, color, national origin, ethnicity, or gender, thus violating the United States Constitution and the California Constitution.

25. The acts of Defendants PUSD, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES were done under color of law in that Plaintiffs are, or will in the future be, subject to not being admitted to a public school as a result of the uncontrolled circumstance of race, color, national origin, ethnicity, or gender.

26. The acts of Defendants PUSD, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES have denied Plaintiffs the full and equal accommodations, advantages, facilities, privileges, or services in violation of United States and California Constitutions, as well as California Civil Code § 51.

27. The acts of Defendants PUSD, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES were done under color of law and subject Plaintiffs to a deprivation of their rights to attend public schools regardless of their race, color, national origin, or ethnicity, thus violating the Fifth and Fourteenth Amendments to the United States Constitution.

28. Defendants are liable to Plaintiffs for violation of 42 USC § 1985.

29. The individual Defendants, VAN ALSTTNE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, are liable to Plaintiffs for depriving Plaintiffs of the privileges to a public education secured by the U.S. and California Constitutions.

30. The individual Defendants, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, have deprived Plaintiffs of the equal protection of the laws pursuant to the Fourteenth Amendment of the U.S. Constitution and Article I, § 7, of the California Constitution, to Plaintiffs' injury.

31. The individual Defendants, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, have violated Article 1, § 31, of the California Constitution, to the injury of Plaintiffs.

32. The individual Defendants, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, have violated Plaintiffs' rights to the equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 7, of the California Constitution, to the injury of Plaintiffs.

33. The individual Defendants, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER and VIGNES, have violated Plaintiffs' rights under the

privileges and immunities clause of the Fourteenth Amendment of the United States Constitution, and Article I, § 7, of the California Constitution, to Plaintiffs' injury.

34. The individual Defendants, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, have violated California Code of Civil Procedure § 526(a).

35. The individual Defendants, VAN .ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, have violated Plaintiffs rights' under Article I, § 8, of the California Constitution, to Plaintiffs' injury.

36. The individual Defendants, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, have violated Plaintiff's rights under 42 USC § 1983, to Plaintiffs' injury.

37. The individual Defendants, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, VIGNES, and WHITE, have violated Plaintiffs' rights under California Civil Code § 51, to Plaintiffs' injury.

38. Defendant PUSD and the individual Defendants, VAN ALSTINE, PADILLA, JACOBS, ARMSTRONG, FOWLER, and VIGNES, have violated Plaintiffs' rights under 42 USC § 2000d, to Plaintiffs' injury.

39. BP 0460 does not fall within Article I, § 31(e), of the California Constitution.

Dated: February 22, 2000.

/s/ Dickran Tevrizian
DICKRAN TEVRIZIAN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Feb. 22, 2000]

Case No. CV 99-1328 DT (MANx)

SYLVIA SCOTT, as guardian ad litem for minors, DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES, and RONALD RUCKER; RENÉ AMY, as guardian ad litem for minors, CAMDEN RENÉ AMY and MARISSA LARAINE AMY; GEORGE FRANCIS and SILVIA JIMENEZ MACPHERSON, as guardian ad litem for minor, GEORGE GORDON MACPHERSON; ROMEO ALVA, as guardian ad litem for minor, JOCELYNE ALVA,

Plaintiffs,

v.

PASADENA UNIFIED SCHOOL DISTRICT; GEORGE VAN ALSTINE; GEORGE PADILLA; JACQUELINE JACOBS; BONNIE ARMSTRONG; LISA FOWLER; VERA VIGNES; in their individual and official capacities, and JOSEPH WHITE ASSOCIATES,

Defendants.

JUDGMENT

Upon consideration of Plaintiffs' Motion for Summary Judgment, the Memorandum of Points and Authorities in Support of Motion, the Statement of Uncontroverted Facts and Conclusions of Law, the Exhibits, and the opposition thereto,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That Plaintiffs Motion for Summary Judgment is hereby Granted, and specifically that Defendants' policy as

embodied in Board Policy 0460 is, to the extent it uses race, ethnicity, or gender in any way, unconstitutional and in violation of the United States Constitution, Fourteenth Amendment, and the California Constitution, Article I, Section 31.

IT IS FURTHER JUDGED AND DECREED:

2. That Defendant PUSD is permanently enjoined from considering race, ethnicity, or gender in determining admissions to any of its schools.

3. That Plaintiffs recover from Defendants attorneys fees and costs in an amount to be set by the Court upon written application with supporting documentation by the prevailing Plaintiffs.

4. That Plaintiffs recover from Defendants damages per CC § 52(a) in the amount of $1,000.00 per minor plaintiff.

Dated: February 22. 2000.

/s/ Dickran Tevrizian
DICKRAN TEVRIZIAN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed Mar. 20, 2000]

Case No. CV 99-1328 DT (MANx)

SYLVIA SCOTT, as Guardian Ad Litem for minors DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES and RONALD RUCKER; RENÉ AMY, as Guardian ad Litem for minors, CAMDEN RENÉ AMY and MARISSA LARAINE AMY; GEORGE FRANCIS and SILVIA JIMENEZ MACPHERSON; ROMEO ALVA, as Guardian ad Litem for minor, JOCELYNE ALVA,

Plaintiffs,

vs.

PASADENA UNIFIED SCHOOL DISTRICT GEORGE VAN ALSTINE; GEORGE PADILLA; JACQUELINE JACOBS; BONNIE ARMSTRONG; LISA FOWLER; VERA VIGNES; in their individual and official capacities, and JOSEPH WHITE ASSOCIATED,

Defendant.

I. BACKGROUND

A. Factual Summary

This action arose out of a policy enacted by the Pasadena Unified School District which established procedures for determining which children may attend certain schools within the school district on the basis of the children's race, color, national origin, ethnicity or gender.

The case has been brought by Plaintiff, Sylvia Scott, as guardian ad litem for minors, Detrick Standmore, Kayla Hunter, Michaela Reyes, and Ronald Rucker; Plaintiff, Rene

Amy, as guardian ad litern for minors, Camden Rene Amy and Marissa Laraine Amy; Plaintiffs George Francis MacPherson and Silvia Jimenez MacPherson, as guardians ad litem for minor, George Gordon MacPherson; Plaintiff Romeo Alva, as guardian ad litem for minor, Jocelyne Alva (collectively, "Plaintiffs") against Defendants Pasadena Unified School District ('PUSD") , George van Alstine, George Padilla, Jacqueline Jacobs, Bonnie Armstrong, Lisa Fowler, and Vera Vignes (collectively, the "Individual Defendants"), and Joseph White Associates ("White") (PUSD and the Individual Defendants, collectively, "Defendants"). Plaintiffs' minors are students who attend schools within PUSD.

Previously, this Court granted summary judgment in favor of Plaintiffs, finding that PUSD Board Policy 0460 ("BP 0460") violated the Plaintiffs' civil rights as provided by the United States and State of California Constitutions.

In order to make BP 0460 constitutional, this Court issued a permanent injunction ordering Defendants to cease giving any "consideration" to the race, ethnicity or gender o applicants to the lottery for the voluntary schools under any circumstances. Accordingly, this Court ordered any references to race, ethnicity or gender in BP 0460(d), ¶ 8, null and void and deleted.

Plaintiffs now move for attorney's fees, damages and *costs* associated with their successful challenge to BP 0460.

II. Procedural Summary

On February 4, 1999, Plaintiffs filed a Complaint in this Court for Declaratory Relief and Injunctive Relief From Policies and Practices of Defendants.

On February 4, 1999, George Francis MacPherson and Silvia Jimenez MacPherson tiled a petition and order for Appointment of Guardian ad Litem as the parents of George

Gordon MacPherson, minor. On February 4, 1999, Rene Amy filed a petition and order for Appointment of Guardian ad Litem as the parent of Camden Rene Amy and Marissa Laraine Amy, minors. On February 4, 1999, Romeo Alva filed a petition and order for Appointment of Guardian ad Litem as the parents of Jocelyne Alva, minor. On February 4, 1999, Sylvia Scott filed a petition and order for Appointment of Guardian ad Litem as the foster parent of Detrick Standmore, Kayla Hunter, Michaela Reyes, and Ronald Rucker, minors.

On March 29, 1999, Plaintiffs filed a First Amended Complaint alleging the following counts [1]:

(1) Count 1 (as to all Defendants - general allegations of conduct)

(2) Count 2 (as to all Defendants violation of 42 U.S.C. § 1985)

(3) Count 3 (as to Individual Defendants—deprivation of the privileges to a public education secured by the U.S. and California Constitutions).

(4) Count 4 (as to Individual Defendants—deprivation of the equal protection of the laws pursuant to the 14th Amendment of the U.S. Constitution and Article I, § 7, of the California Constitution).

(5) Count 5 (as to Individual Defendants—violation of Article I, § 31 of the California Constitution).

(6) Count 6 (as to Individual Defendants—violation of the equal protection provisions of the 5th and 14th Amendments to the United States Constitution, and Article I, § 7, of the California Constitution).

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[1] The face of the First Amended Complaint fails to specifically label the claim asserted in each "count."

(7) Count 7 (as to Individual Defendants—violation of the privileges and immunities clauses of the 14 Amendment to the United States Constitution, and Article I, § 7 of the California Constitution).

(8) Count 8 (as to Individual Defendants—violation of the California Code of Civil Procedure §526a).

(9) Count 9 (as to Individual Defendants—violation of Article I, § 8 of the California Constitution).

(10) Count 10 (as to Individual Defendants—violation of 42 U.S.C. § 1983)

(11) Count 11 (as to Individual Defendants and White—violation of California Civil Code § 51).

(12) Count 12 (as to PUSD and Individual Defendants—violation of 42 U.S.C. § 2000d).

On April 19, 1999, Defendants filed a Motion to Dismiss Complaint. On April 23, 1999, Defendants filed a Corrected Motion to Dismiss Complaint.

On June 17, 1999, Plaintiffs filed a Notice of Voluntary Dismissal of Defendant White, without prejudice.

On June 28, 1999, this Court filed an order Denying Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint.

On July 8, 1999, Defendants filed an Answer to Plaintiff's First Amended Complaint.

On September 7, 1999, this Court held a Mandatory Status Conference, where it set the Discovery Cut-Off date of February 18, 2000, and the Pre-Trial Conference for April 17, 2000.

On February 7, 2000, this Court issued an order Denying Defendants' Motion for Summary Judgment and Granting Plaintiffs' Motion for Summary Judgment. This order was entered on February 8, 2000.

On February 18, 2000, Plaintiffs filed the Motion for Attorney's Fees, Damages and Costs presently before this Court.

On February 22, 2000, this Court issued a Judgment, Findings of Fact and Conclusions of Law. The Judgment, Findings of Pact and Conclusions of Law were entered on February 23, 2000.

I. DISCUSSION

A Standard

1. Federal Rule of Civil Procedure 60(a)

Rule 60(a) of the Federal Rules of Civil Procedure permits a court to correct "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . . at any time of its own initiative . . . ."

2.Motion to Dismiss for Failure to State a Claim Rule 12(b) (6) of the Federal Rules of Civil Procedure provides that a defendant may seek to dismiss a complaint for 'failure to state a claim upon which relief can be granted' FED. R. CIV. P. 12 (b) (6). Pursuant to Rule 12 (b) (6) , the court may only dismiss a plaintiff's complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 45-46 (1957); *Russell v Landrieu* 621 F.2d 1037, 1039 (9th Cir. 1980). The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether a plaintiff is entitled to offer evidence in support of his claim. Cabo Distributing. Co, Inc. Brady, 821 F.Supp. 601 (N.D. Cal. 1992). Dismissal is proper under Rule 12(b) (6) only where there is a lack of a cognizable legal theory, or an absence of sufficient facts alleged under a cognizable legal theory. *Balisteri v Pacifica Police Dept* 901 F. 2d 696, 699 (9th Cir. 1988). In testing the sufficiency of a complaint, the

court must assume that all of the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *United States v City of Redwood City* 640 F.2d 963, 966 (9th Cir. 1981) (citing *California Dump Truck owners Assn, v Associated General Contractors of America,* 562 F2d 607, 614 (9th Cir. 1977); *McKinney v Debord* 507 F2d 501, 503 (9th Cir. 1974)). Therefore, it is only the extraordinary case in which dismissal is proper. *Corsican Productions v Pitchess* 338 F.2d 441, 442 (9th Cir. 1964)

Generally, orders granting motions to dismiss are without prejudice unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." *Schreiber Dist v Serv-Well Furniture* 806 F.2d 1393, 1401 (9th Cir. 1986)

3. Attorneys' Fees

When it sets a fee, the district court must first determine the presumptive lodestar figure by multiplying the number of hours reasonably expended on the litigation by the reasonable hourly rate. *Intel Corp v. Terabyte Intern, Inc.,* 6 F.3d 614, 622 (9th Cir. 1993) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L Ed 2d 40 (1983)). "If the applicant satisfies its burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee . . . . "*Jordan v. Multnomah County,* 815 F.2d 1258, 1263 (9th Cir. 1987) (footnote and citation omitted). Next, in appropriate cases, the district court may adjust the "presumptively reasonable" lodestar figure based upon the factors listed in *Kerr v. Screen Extras Guild Inc.,* 526 F.2d 67, 69-70 (9th Cir. 1975), that have not been subsumed in the lodestar calculation. *Id.* The Kerr factors are:

1. The time and labor required;
2. The novelty and difficulty of the questions;

3. The skill requisite to perform the legal services properly;
4. The preclusion of other employment due to acceptance of the case;
5. The customary fee;
6. The contingent or fixed nature of the fee;
7. The limitations imposed by the client or the case;
8. The amount involved and the results obtained;
9. The experience, reputation, and ability of the attorneys;
10. The undesirability of the case;
11. The nature of the professional relationship with the client;
12. Awards in similar cases.

Kerr, 526 F.2d at 70. The lodestar amount presumably reflects the novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation, and the results obtained from the litigation. *Blum v Stenson*, 465 U.S. 886, 898-900, 104 S. Ct. 1541, 1548-49, 79 L. Ed. 2d 891 (1984)

California courts utilize a similar analysis. In determining the reasonableness of the request for attorneys' fees, the court should consider:

> the nature of the litigation, the difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorneys' efforts, his learning, his age, and his experience in the particular type of work demanded, the intricacies and importance of the litigation, the labor and necessity for skilled legal training and ability in trying the cause and the time consumed.

Clayton Development Company v Falvey (1988) 206 Cal. App. 3d 438, 447 (internal quotations and citations omitted)

B. Analysis.

1. Damages Pursuant To California Civil Code § 51 Are Inappropriate

Plaintiffs' motion before this Court asks for damages "as to the Individual Defendants and Defendant White [for] violation of CAL. CIVIL CODE § 51," the Unruh Civil Rights Act, as provided by CAL. CIVIL CODE § 52 (a). CAL. CIVIL CODE § 51 provides that everyone in the State of California is "free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

While PUSD and the Individual Defendants filed objections to Plaintiffs' Proposed Findings of Fact and Conclusion of Law, they did not object to the inclusion of references to CAL. CIVIL CODE § 51 in them. Now, Defendants contend that summary judgment as to Plaintiffs' cause of action based on this statute was inappropriate since Plaintiffs' motion for summary judgment did not address this claim.

Upon closer inspection, it is clear that Plaintiffs misconstrued this Court's Summary Judgment Order of February 8, 2000. This Court did not address Plaintiffs' Unruh Act claims in its Summary Judgment order because it believed that this claim was disposed of once Plaintiffs dismissed Defendant White from the action without prejudice on June 17, 1999. This belief was supported by the fact that neither party made any mention whatsoever of Cal. CIVIL CODE § 51 or Plaintiffs' Unruh Act claim in their summary judgment papers.

As the quoted portion of CAL. CIVIL CODE § 51 indicates, it is only applicable to "all *business* establishments of any kind whatsoever." CAL. CIVIL CODE § 51 (emphasis added). Originally, Plaintiffs directed its cause of action under this statute, their eleventh cause of action, against the Individual Defendants and Defendant White. *See* First Amended Complaint, ¶1 61-64. Given that the statute only applies to businesses, Plaintiffs could only conceivably pursue this cause of action, if at all, against Defendant White, not the Individual Defendants. Clearly, one of two things should have taken place in order to eliminate the confusion with which this Court is now faced. Either Plaintiffs should have formally dismissed their Unruh Act claim concurrently with their dismissal of Defendant White or the Individual Defendants should have moved for dismissal with prejudice of the Unruh Act claim as pertaining to them.

In addition, Plaintiffs mistakenly included references to Defendant White throughout the Findings of Fact and Conclusions of Law filed with this Court. Defendants did not bring this mistake to the Court's attention. It was only upon closer inspection of the Findings of Fact and Conclusions of Law in addressing Plaintiffs request for damages pursuant to its Unruh Act claims that the Court noticed this mistake.

Based on the foregoing, pursuant to FED. R. Civ. P. 60 (a) and 12 (b) (6) , this Court hereby DISMISSES WITH PREJUDICE,

sua sponte, Plaintiffs' eleventh cause of action, which is based on CAL. CIVIL CODE § 51, for failure to state a claim upon which relief may be granted because Plaintiffs cannot maintain that cause of action against the Individual Defendants under any circumstances given that CAL. CIVIL CODE § 51 only applies to "business establishments."

Since Plaintiffs cannot maintain their Unruh Act claim against the Individual Defendants, it follows that they are not

entitled to damages pursuant to that claim. Accordingly, this Court hereby DENIES Plaintiffs' Motion for Damages and Attorney's Fees arising out of its Unruh Act claim.

Finally, Plaintiffs are hereby ordered to submit amended Findings of Fact, Conclusions of Law and Judgment which make no reference to either CAL. CIVIL CODE § 51 or Defendant White. To the extent this Court's Judgment entered on February 23, 2000 awarded Plaintiffs "damages per CAL. CIVIL CODE § 52(a) in the amount of $1,000.00 per minor Plaintiff," such award is hereby vacated. Nothing in this order shall be construed to disturb, modify or otherwise alter this Court's previous findings with respect to the constitutionality of BP 0460.

2. Plaintiffs are entitled to reasonable attorneys' fees

42 U.S.C. § 1988 (b) permits a "court, in its discretion, [to] allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Such attorney's fees are available to prevailing parties in actions based on Sections 1981, 1981(a), 1982, 1983, 1985, 1986 and 2000d of Title 42 of the United States Code. See 42 U.S.C. § 1988(b).

Here, Plaintiffs have prevailed on causes of action based on 42 U.S.C. § 1983, 1985 and 2000d, among others. Therefore, they are eligible for attorneys' fees as provided by 42 U.S.C. § 1988(b). Plaintiffs have requested attorneys' fees totaling $99,332.50 for work performed by William G Gillespie, Kevin T. Snider and Gary G. Kreep. Specifically, Plaintiffs state that Mr. Gillespie worked for 187.3 hours on the case at an *hourly rate of two* hundred dollars ($200.00), Mr. Snider worked for 285.4 hours on the case at an hourly rate of two hundred dollars ($200.00) and Mr. Kreep worked for 21.3 hours on the case at an hourly rate of two-hundred twenty-five dollars ($225.00).

After examining the billing records submitted by Plaintiffs' counsel as well as the issues raised by the facts of the instant

action, this Court finds it appropriate to modify the number of billable hours and hourly rate submitted by Plaintiffs' counsel in support of their Motion for Attorneys' Fees. First of all, this Court finds that given their experience in this area of the law[2], a reasonable hourly rate for the services of Mr. Gillespie and Mr. Snider is one hundred seventy-five dollars ($175.00), not two hundred dollars ($200.00) as Plaintiffs request. Given his more than 20 years of experience in the field of education law, *see* Kreeps Deci., ¶ 7, this Court finds that Mr. Kreep's hourly rate of two hundred twenty-five dollars ($225.00) is reasonable.

Secondly, this Court finds that the number of hours for which Plaintiffs have requested attorneys' fees should be altered as well. This court agrees with the PUSD and Individual Defendants that they should not be held liable for those attorneys' fees incurred for activities relating to Defendant White because Plaintiffs voluntarily dismissed that defendant from the action. Therefore, this Court hereby strikes all time spent on phone conferences with counsel for Defendant White. After reviewing the Itemized Bill submitted by Plaintiffs' counsel in support of the instant Motion, the Court finds that Mr. Snider spent 1.6 hours working on the case with respect to Defendant White and Mr. Kreeps spent a total of 0.3 hours on such work. This time shall be excluded from the both attorneys' lodestar figure.

Similarly, time spent by the Plaintiffs' attorneys on discussions with the American Civil Liberties Union ("ACLU"), journalists, local attorneys regarding this Court, and the Pacific Legal Foundation cannot fairly be charged to PUSD and the Individual Defendants because they do not directly relate to Plaintiffs ultimately prevailing against

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[2] Mr. Gillespie does not indicate how much experience he has in this practice area. Mr. Snider indicates that he has worked for approximately 5-6 years in this practice area. *See* Snider Deci., ¶ 17.

PUSD. Mr. Gillespie spent 2.2 hours in discussions with the ACLU while Mr. Snider spent 0.4 hours. Mr. Gillespie spent 0.5 hours discussing the case with the press, O2 hours discussing this Court with a local attorney and 0.5 hours discussing the result of the case with the Pacific Legal Foundation. All of this time, which amounts to a total of 3.4 hours of Mr. Gillespie's time and 0.4 hours of Mr. Spider's time, shall be excluded from the lodestar calculation.

Plaintiffs also request attorneys' fees for certain travel time to and from Los Angeles, not all of which shall be included in the lodestar calculation. Specifically, the 8.2 hours Mr. Gillespie spent traveling to and from Los Angeles on January 18, 2000, under the mistaken impression that a hearing would occur shall be excluded from the lodestar calculation because service of Defendants' Ex Parte Application to continue the hearing scheduled for that day was proper. Therefore, Plaintiffs were on notice that the hearing may be rescheduled and it is reasonable to expect Plaintiffs' counsel to take the initiative to check with the Court to see whether or not Defendants' Ex Parte Application was granted.

In addition, there are entries for which Plaintiffs have failed to sufficiently describe so as to support a conclusion that the time spent is related to Plaintiffs' successful prosecution of their claims against the remaining defendants. Furthermore, some of these entries appear duplicative. These include entries such as "E-mail to . . .," "Review e-mail from . . .," "T/C . . .," "Read e-mail," "Sent email,' "Read letter," or "Drafted Letter." While the court recognizes that the work product and attorney-client privileges do not permit complete disclosure of every detail of communication between a client's attorneys or an attorney and his client, Plaintiffs' counsel could have provided more detailed descriptions of these communications.

In all, Mr. Gillespie's billing records refer to 12.5 hours of time which cannot be conclusively attributed to work in

connection with Plaintiffs' successful efforts before this Court. Mr. Snider's billing records contain references to a total of 13.3 hours of such time. And, Mr. Kreeps' billing statement contains 3.2 hours of time that is either duplicative of Mr. Snider's work or Mr. Gillespie or which cannot be conclusively attributable to work in connection with Plaintiffs' successful efforts. To equitably resolve the concerns this Court has with these hours, this Court hereby reduces such hours by thirty-three percent (33%). Accordingly, 4.1 hours shall be deducted from Mr. Gillespie's time, 4.4 hours shall be deducted from Mr. Snider's time and 1.1 hours shall be deducted from Mr. Kreeps' time.

Additionally, based on this Court's familiarity with the documents submitted to it, the complexity of the issues in this case and the attorneys' level of expertise in this practice area, some of the hours for which Plaintiffs' counsel have billed are excessive. For example, Mr. Snider has included in his billing record 1.6 hours for drafting the Petition and Order for Appointment of Guardian Ad Litem, a document which barely consists of 3/4 of a page of text. Altogether, this court has found that 4 hours of Mr. Gillespie's work and 12.9 hours of Mr. Snider's work on documents submitted to the Court are excessive and shall be excluded from the lodestar calculation.

Finally, Mr. Snider has stated that a total of 0.6 hours was improperly included in his billing summation. *See* Snider Dec. 12-13. This amount shall also be deducted from the total number of hours used to calculate the lodestar amount.

In summary, 19.7 hours shall be deducted from the 187.3 hours Mr. Gillespie submitted, 19.9 hours shall be deducted from the 285.4 hours Mr. Snider submitted and 1.4 hours shall be deducted from the 21.3 hours Mr. Kreeps submitted.

Based on the foregoing, Mr. Gillespie's lodestar figure is the result of 167.6 hours at $175 per hour, which amounts to $29,330. Mr. Snider's lodestar figure is the result of 265.5 hours at $175 per hour, which amounts to $46,462.50. Mr. Kreeps' lodestar figure is the result of 19.9 hours at $225 per hour, which amounts t o $4,477.50.

Given the circumstances and complexity of the issues of the case at bar, it is unnecessary for this Court to apply the *Kerr* factors to adjust Plaintiffs' attorneys' fees further. Based on the foregoing, this Court hereby GRANTS Plaintiffs' Motion for Attorneys' Fees. PUSD and the Individual Defendants are hereby ordered to pay Plaintiffs' attorneys' fees totaling $80,270.00.

3. Plaintiffs' Motion for Costs Is Moot

In the Judgment entered on February 23, 2000, this Court awarded costs to Plaintiffs. Pursuant to Local Rule 16 of the Local Rules of Civil Procedure, Plaintiffs, as the prevailing party, must file and serve their Bill of Costs with the Clerk of the Central District of California, not this Court, within 15 days after the entry of judgment. Such Bill of Costs must be attached to a Notice of Application to the Clerk to Tax Costs. It is for the Clerk of the Central District, not this Court, to evaluate and decide what costs, if any, may be taxed to the PUSD and Individual Defendants. In light of the fact that Plaintiffs' Motion for Attorneys' Fees, Damages and Costs contains no argument whatsoever addressing its Bill of Costs, this Court assumes that Plaintiffs are aware of Local Rule 16.3's requirement.

Based on the foregoing, this Court hereby DENIES AS MOOT Plaintiffs' Motion for Costs.

III. CONCLUSION

Based on the foregoing, pursuant to FED. R. Civ. P. 60 (a), this Court hereby orders Plaintiffs, sua sponte, to submit

amended Findings of Fact, Conclusions of Law and Judgment which make no reference to either CAL. CIV. CODE § 51 or Defendant White.

Accordingly, this Court hereby DENIES Plaintiffs' Motion for Damages and Attorney's Fees arising out of its Unruh Act claim. Nothing in this order shall be construed to disturb, modify or otherwise alter this Court's previous findings with respect to the constitutionality of BP 0460.

In addition, this Court hereby GRANTS Plaintiffs' Motion for Attorneys' Fees in the amount of $80,270.00.

Finally, this Court hereby DISMISSES AS MOOT Plaintiffs' Motion for Costs.

IT IS SO ORDERED.

DATED: Mar 20, 2000

Dickran Tevrizian
DICKRAN TEVRIZIAN, Judge
United States District Court

FILED
FEB 12 2003
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No. 02-1054

IN THE
Supreme Court of the United States

SYLVIA SCOTT, *et al.*,
Petitioners,

v.

PASADENA UNIFIED SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

MAREE F. SNEED
PATRICIA A. BRANNAN*
ALEXANDER E. DREIER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-8686

* Counsel of Record

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the court below was correct in holding that Petitioners' claims presented no justiciable case or controversy on either of two grounds -- that they lacked standing or that their claims were not ripe for review -- where the challenged provision of school district policy was never applied to Petitioners or any other student and the record amply demonstrated that any possible future injury depended on a speculative chain of unknowable events.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioners Sylvia Scott, *et al.* ("Scott" or the "Scott Petitioners") brought this action against Respondents the Pasadena Unified School District, *et al.* ("PUSD") in March 1999. Scott argued that PUSD's policy then in effect for assigning students to three of its magnet schools (known in the school district as "voluntary schools") should be declared unlawful on its face because it provided for the possibility of consideration of race, ethnicity, gender and other factors in admission lotteries, although the policy prohibited consideration of those factors except in the narrow circumstance where it was necessary to avoid segregation. Pet. App. 8a. Scott argued that her objection to the mere existence of that

provision of the policy, BP 0460(d)(8),[1] gave rise to a justiciable case or controversy, even though (1) the provision was in effect for only one school year and was not applied to any student, including Petitioners, because the narrow conditions necessary for its application were not met, *id.* at 10a, 17a, 22a n.17, 27a, and (2) whether the provision would ever be applied in the future in a manner harmful to Petitioners depended on a chain of contingencies resting on multiple assumptions that rendered any possible future injury to Petitioners highly speculative and abstract. *See id.* at 26a. The court of appeals held that because neither the Scott Petitioners nor any other student was ever subjected to different treatment on the basis of race, ethnicity or gender under the challenged policy, and the possibility of unequal treatment in the future was purely speculative, Petitioners' hypothetical objection to the policy gave rise to no justiciable case or controversy. *Id.* at 28a. The court of appeals provided two alternative grounds for dismissal: that Scott lacked standing and that her claims were not ripe for review. This Court should deny the Petition because neither ground meets the standard of Supreme Court Rule 10, and either is sufficient to support the court of appeals' judgment.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY COURT.

1. Scott argues that she had standing to challenge BP 0460(d)(8) because she "submitted applications for seats at

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[1] It is telling that the Petition includes few references to BP 0460(d)(8), the voluntary schools lottery provision that was at issue below. Instead, the Petition focuses on a different provision -- BP 0460(c)(3) -- that does not refer to voluntary schools or a lottery. To the extent Scott now asserts standing to challenge BP 0460(c)(3), that issue was not presented to the district court or passed upon by either of the courts below. *See* Pet. App. 6a-7a n.5. For that reason alone, this Court should disregard Scott's eleventh-hour reliance on this new provision.

the voluntary schools and intends on submitting applications for the coming years," and that these "salient facts" alone bring her "fully within the sphere of standing * * *." Pet. 11. As the court of appeals held, the operation of the policy at issue shows the abstract and hypothetical nature of Scott's claims. BP 0460(d)(8) provided that if a voluntary school received more applications than it had seats available, after siblings of current students were admitted, PUSD would hold a computerized lottery for the remaining seats. Pet. App. 8a. The policy permitted PUSD to consider gender, race or ethnicity, socioeconomic status, language and special needs as factors in the lottery process for a voluntary school, but these factors could only be considered "'when necessary to create an integrated setting.'" *Id.* (quoting BP 0460(d)(8)). Use of these factors was further restricted to the selection of students for the entering grade of each voluntary school (kindergarten for two of the voluntary schools; eighth grade for the other). *Id.*

As both lower courts found, PUSD never applied the provision Petitioners challenged. The provision was in effect for only one school year -- 1999-2000. That year one voluntary school, John Marshall, was under-subscribed and thus admitted all applicants, and the other voluntary schools, Norma Coombs and Don Benito, held race- and gender-neutral lotteries because taking race, gender or any of the other possible factors into account was not necessary to create an integrated setting. Pet. App. 9a-10a. Before the 2000-2001 school year, PUSD suspended the policy and has not reinstated it. Thus, the challenged provision that raised the mere *possibility* of consideration of gender, race and ethnicity in voluntary school admissions was not applied in

the sole year of its existence.[2] Based on these facts and the entire record, the court of appeals held that this case "involves neither a limitation on the number of seats made available to students of a particular racial or gender group nor a classification of students by race or gender in order to move them into separate lottery cohorts * * *." *Id.* at 22a n.17.

In light of the record evidence demonstrating how BP 0460(d)(8) operated and the particular circumstances of these Petitioners, the court of appeals held that Scott failed to establish an injury-in-fact necessary for standing. Applying this Court's well-established precedents, the court of appeals examined whether on the record in this case '"the threat of injury is both real and immediate, not conjectural or hypothetical."' Pet. App. 18a-19a (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). Given the narrow circumstances in which race, ethnicity or gender would be considered under the policy, the court noted that "Scott's professed intention to subject herself to a racial or gender weighted lottery is contingent upon an unpredictable set of societal factors that may or may not arise * * *." *Id.* at 25a; *see id.* at 21a-22a (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)) (requiring that "the injury is 'certainly impending' ") and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 n.2 (1992). For example, if the Petitioners applied to the voluntary schools in some future year, it was unknowable whether: a lottery would be held for the school (no

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[2] Scott asserts: "Scott submitted applications for seats at the voluntary schools." Pet. 11. Three of the Scott Petitioners did not apply to any voluntary school. Pet. App. 9a. Seven of the eight Petitioners never were denied admission to any voluntary school for which they applied. *See id.* at 10a. The only Petitioner who was not admitted to a voluntary school for which he applied was denied admission based on a random, race- and gender-neutral lottery for that school. *Id.* at 10a & n.8. Six of the Petitioners are now beyond the grade at which they would be eligible for any lottery, and for that reason the court of appeals held their claims to be moot, *id.* at 19a, a ruling not challenged in the questions presented.

lottery is held if the school is under-subscribed, as was the case with John Marshall in 1999-2000); if a lottery were held, whether it would include consideration of race, ethnicity or gender (those factors would only be considered if necessary to prevent segregation); if such factors were considered, whether they would operate in a manner that harmed or benefited the Petitioner (Petitioners are of different races and genders; if any given student belonged to a group underrepresented in the applicant pool, for example, he or she would receive a "plus" in the lottery). Pet. App. 17a and n. 12. *See Lyons*, 461 U.S. at 102 (requiring a " 'real and immediate threat of * * * injury' ") (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)).

The court of appeals addressed Scott's argument concerning *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). That case supports the court of appeals' decision. In *Northeastern Florida*, this Court held that " 'injury in fact' in an equal protection case * * * is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 666. As the court of appeals in this case correctly held, PUSD never imposed a race- or gender-based "barrier" to Scott's application to any voluntary school. The court of appeals holding is consistent with those of other federal courts of appeals that have addressed similar circumstances. *See, e.g., Farmer v. Ramsay*, 43 Fed. Appx. 547, 2002 WL 1766615 (4th Cir. Aug. 1, 2002); *Rosenfeld v. Montgomery County Pub. Schs.*, 25 Fed. Appx. 123, 129-130, 2001 WL 1658893 (4th Cir. Dec. 27, 2001). The other question *Northeastern Florida* addressed -- whether plaintiffs must show that they would have obtained the sought-after benefit absent the challenged racial barrier, *id.* -- simply is not at issue in this case. *See* Pet. App. 20a-21a.

2. The court of appeals also held that Scott's claims were not ripe for review because they rested " 'upon contingent

future events that may not occur as anticipated, or indeed may not occur at all.' " Pet. App. 29a (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)) (internal quotations and citation omitted). The court noted that the factual record in this case was not sufficiently well-developed to permit adjudication of Scott's claims, *id.* at 30a, the court's review "would stand on a much surer footing in the context of a specific application" of BP 0460(d)(8), *id.* at 32a (internal quotation and citation omitted), and in light of the record there was no hardship to Scott in declining to rule on her equal protection challenge. *Id.* That holding was consistent with this Court's well-established precedents, which hold that federal courts should decline to adjudicate a plaintiff's abstract objection to a law or a governmental policy. *See, e.g., Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967).

3. The Petition describes the policy and events at issue in this case in the present tense, *e.g.*, Pet. 3, suggesting that BP 0460(d)(8), is still operative. It is not; PUSD has suspended consideration of race, ethnicity and gender in its student assignment policy. Pet. App. 11a. For that reason, the injury Scott alleges is now even more speculative than it was when she brought this action. Although the court of appeals vacated the district court order in this case that barred PUSD from considering such factors, PUSD has not determined whether it would do so in the future. Thus, in its current posture, PUSD is no different than any local, state or federal governmental agency that might conceivably in the future promulgate a race-conscious policy but does not currently have one in place. Scott's objection to that abstract possibility does not give rise to a justiciable case or controversy with PUSD any more than it would with those other agencies.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

MAREE F. SNEED
*PATRICIA A. BRANNAN
ALEXANDER E. DREIER
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-8686

* Counsel of Record

Counsel for Respondents

(3)

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On Petition for Motion for Reconsideration to the Ninth Circuit Court of Appeals

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

GARY G. KREEP *
RICHARD D. ACKERMAN
KEVIN T. SNIDER
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Ninth Circuit reversed the district court based upon standing and ripeness. It created a new test for standing in an equal protection context derived from the standard used in First Amendment cases. In addition, the court of appeals created what amounts to a bar against bringing a facial challenge to any law which has suspect classifications, i.e., race and gender. As a result, the Ninth Circuit thus prohibited all facial challenges even if the law is not narrowly tailored to promote a compelling state interest.

The Pasadena Unified School District ("PUSD") does not directly address the two legal issues raised by Sylvia Scott, et al. ("Scott") in her Petition.[1] Instead, PUSD primarily relies

[1]Should the elements of the first prong of Article III standing (injury-in-fact) in an equal protection context be modified from the rule provided

on facts that occurred after the complaint was filed. In addition, PUSD also asserts one new fact which it claims occurred after judgment was entered against it, i.e., it has suspended the use of race or gender in assigning students to seats. Brief in Opposition, pg. 3 and 6. As the facts are established at the time the complaint was filed, *Newman-Green, Inc. v. Alfonzo-Larrian*, 490 U.S. 826, 830 (1989), PUSD's reliance on facts that chronologically occurred post-filing cannot be used as a shield. In like manner, the Ninth Circuit's reliance on those same facts was in error.[2]

ARGUMENT

The heart of the first issue is whether the "injury-in-fact" prong for Article III standing requires an "imminent threat of enforcement." Appendix B, 25a-27a, citing *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000). The court of appeals created a new rule for standing by relying on the analysis used in the context of alleged violations of the First Amendment rather than claims arising under equal protection. The question that PUSD failed to address is whether the Ninth Circuit's new rule is proper. Indeed, PUSD does not even cite the case that the court of appeal relied upon in drafting this new rule for standing, i.e., *Thomas*. As PUSD has not attempted to defend this new rule, much less provide analysis, this should be

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by this Court in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993)? 2. Does the ripeness doctrine require a party to wait and see the manner in which the government will carry out a race and gender-based policy before bringing a facial challenge to said policy?

[2] The facts that both PUSD and the Ninth Circuit rely on are those centered around the seat assignment lottery which occurred on April 7, 1999. Appendix B, pg. 9A. It is crucial to note that the complaint was filed on February 4, 1999. Appendix C, pg. 38a. Moreover, the First Amended Complaint was filed on March 29, 1999. Appendix B, pg. 10a.

deemed a concession that the new barriers to standing erected by the Ninth Circuit are without merit and should be overruled.

Instead of discussing the validity of the new rule for standing created by the Ninth Circuit, PUSD relies almost exclusively upon the "facts" in its opposition brief. Not only does this evade the primary legal issues, but also violates a cardinal rule for standing. Namely, the issue of standing is determined by the facts at the time the complaint is filed. *Newman-Green*, *Id.*, 830. Both PUSD and the Ninth Circuit rely heavily, if not exclusively, upon the facts that arose after the case was filed. In contrast, the undisputed facts that must be relied upon are what the district court found. Namely, that five of the Scott children applied to the voluntary schools and that all of the children stand able and ready to apply to said schools. Appendix C, pg. 44a. The Ninth Circuit's new rule notwithstanding, as a matter of law, this intention to apply to voluntary schools in the future, provides standing pursuant to *Northeastern Florida*, *Id.*, 666.

The second issue raised by Scott involves ripeness. Can a policy which, on its face, provides or withholds benefits based upon race and gender be facially challenged? The Ninth Circuit has ruled that Scott must wait and see how the law will be enforced before bringing a facial challenge. In contrast, Scott asserts that a facial challenge to a law which contains suspect classifications is proper when, on its face, it is not narrowly tailored to serve a compelling state interest. In view of Scott's position, PUSD simply does not explain how the government can execute an unconstitutional law in a constitutional manner. Further, if the Ninth Circuit's position is allowed to stand, then a facial challenge to a law that erects racial and gender barriers will be barred based on a new and radical rule for ripeness.

Again, PUSD fails to provide any meaningful discussion on the new rule created by the appellate court. Instead,

PUSD asserts that the case is not ripe because it claims that the School District has now ceased from using gender and race in assigning seats. It states, in pertinent part, as follows:

> "PUSD has suspended consideration of race, ethnicity and gender in its student assignment policy...Although the court of appeals vacated the district court order in this case that barred PUSD from considering... [race and gender], PUSD has not determined whether it would do so in the future." Brief in Opposition, pg. 6.

Although PUSD is using this fact as a shield based upon the doctrine of ripeness, it is actually a claim that the case is now moot because of PUSD's subsequent activity. A nearly identical argument was raised, and rejected by this Court, in *Northeastern Florida*. In that case, the government agency repealed the ordinance in question. Rejecting the government's argument, this Court opined as follows:

> "[T]he mootness question [is [controlled] by] *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), where we applied the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' *Id.*, at 289. Although the challenged statutory language at issue in City of Mesquite had been eliminated while the case was pending in the Court of Appeals, we held that the case was not moot, because the defendant's 'repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.'" *Northeastern*, *Id.*, 661, 662.

Of course, PUSD's position that it has not determined whether it will engage in the policy of assigning seats to children based upon race and gender in the future, demonstrates why the judiciary has wisely determined that it will not consider a case moot as a result of the voluntary cessation of illegal conduct.

Finally, PUSD quotes the appellate court's assertion that the Scott claims are not ripe for review because they rested "'upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Brief in Opposition, pg. 6, quoting the Ninth Circuit at Appendix B, pg. 29a. The appellate court was quoting *Texas v. United States*, 523 U.S. 296, 300 (1998). Said case is distinguishable in that it did not involve a facial challenge to a law that had racial and gender classifications without any narrowly tailored compelling state interest. Indeed, *Texas* was not an equal protection case. As such, the reliance by the Ninth Circuit on *Texas* is misplaced.

CONCLUSION

In view of the foregoing, Scott requests that the Petition be granted.

Respectfully submitted,

GARY G. KREEP *
RICHARD D. ACKERMAN
KEVIN T. SNIDER
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086
Counsel for Petitioners

* Counsel of Record

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